TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 158.

THE NEWBURYPORT WATER COMPANY, APPELLANT,

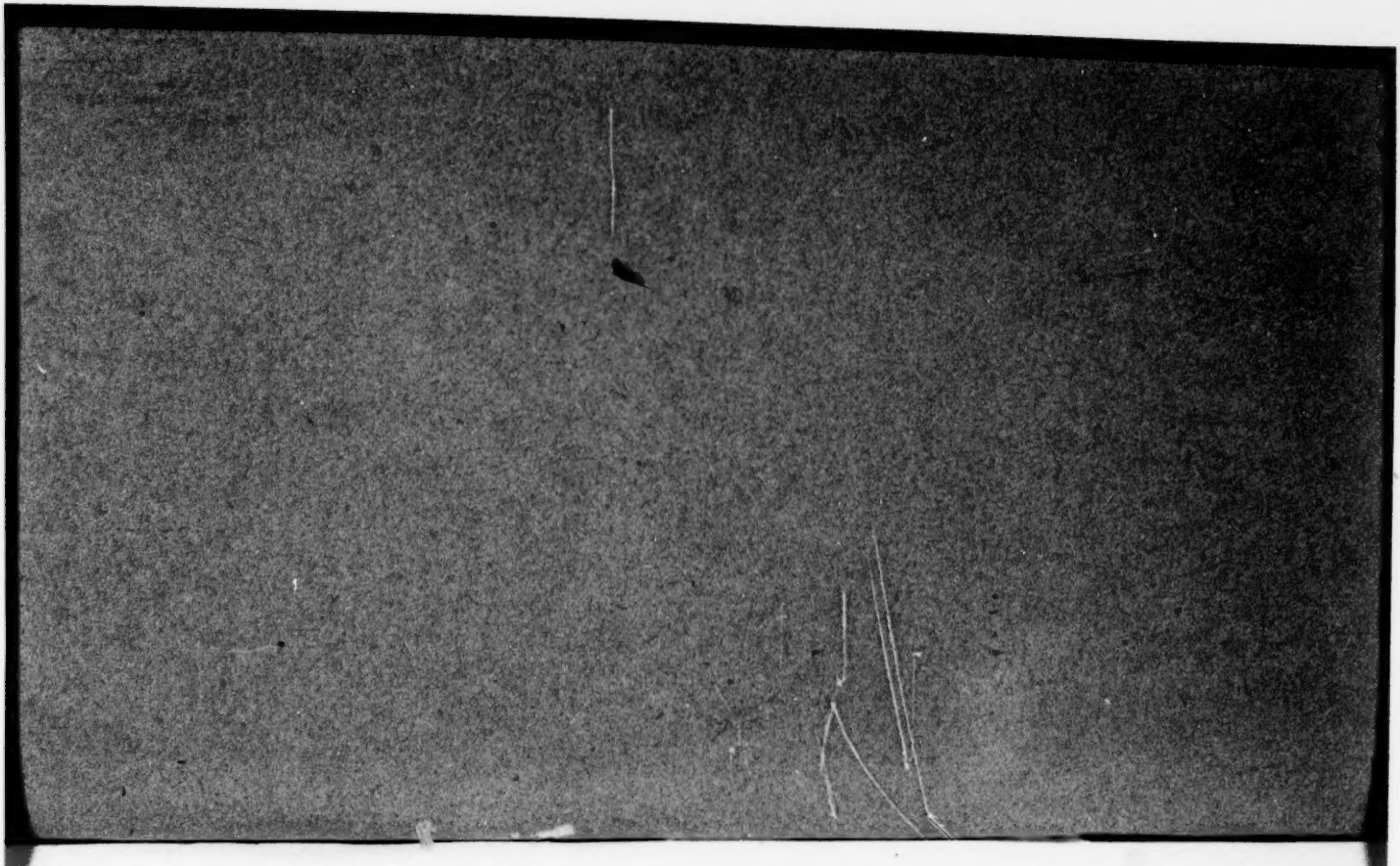
vs.

THE CITY OF NEWBURYPORT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED JANUARY 8, 1906.

(18,770.)



17269

(18,770.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. 182.

THE NEWBURYPORT WATER COMPANY, APPELLANT,

vs.

THE CITY OF NEWBURYPORT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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a Circuit Court of the United States, District of Massachusetts.
In Equity.

NEWBURYPORT WATER COMPANY, Complainant,
v.
CITY OF NEWBURYPORT, Defendant. } No. 924.

Transcript of Record.

1 Circuit Court of the United States, District of Massachusetts.
In Equity.

NEWBURYPORT WATER COMPANY
v.
CITY OF NEWBURYPORT. } No. 924.

Bill of Complaint.

(Filed July 21, 1897.)

To the judges of the circuit court of the United States for the district of Massachusetts:

The Newburyport Water Company, a corporation duly established under the laws of the Commonwealth of Massachusetts, and located therein, brings this bill of complaint against the City of Newburyport, a municipal corporation duly established under the laws of said Commonwealth, and located in the county of Essex in said Commonwealth.

And thereupon your orator complains and says:

1. Your orator, The Newburyport Water Company, is a corporation duly established and existing under and by virtue of the provision of an act of the general court of Massachusetts entitled "An act to incorporate the Newburyport Water Company, approved April 23, 1880, and constituting chapter 235 of the Acts and Resolves passed by the general court of Massachusetts in the year 1880, a copy of which act, marked "Exhibit A," is hereto annexed and made part hereof.

2. The defendant, The City of Newburyport, is a municipal
2 corporation duly established by and under chapter 296 of the Acts of said general court in the year 1851.

3. On information and belief that in the year 1874, defendant, the said City of Newburyport, by a vote of its citizens, declined to ask for legislation authorizing a system of water supply for said city; that in 1878 (chapter 240) an act was passed by said general court which authorized the city to take a supply of water and to build a plant for the distribution of water, which act required for its acceptance a two-thirds vote of the voters present and voting in said city

of Newburyport. A vote was had thereon, resulting in the failure to accept said act.

A copy of said act of 1878, marked "Exhibit B," is hereto annexed and made part hereof.

That said act of 1878 (chapter 240) was continued in force by an act of the said general court, passed in 1879 (chapter 240), a copy of which last mentioned act, marked "Exhibit C," is hereto annexed and made part hereof.

On information and belief that the incorporators of said act of 1880, prior to the passage of said act, petitioned said general court for the passage of such act, and, while such petition was pending, the following order relating to said petition was adopted by said city:

"CITY OF NEWBURYPORT.
IN COMMON COUNCIL, *March* 8, 1880.

Ordered, the mayor and aldermen concurring, that his honor the mayor, for and in behalf of the city of Newburyport, be and is hereby authorized and instructed to sign in his official capacity the petition accompanying this order, and cause the seal of the city to be affixed thereto, and the city solicitor be and is hereby authorized and directed to present the same to the general court now in session, at his earliest convenience, and to use his best efforts to obtain for the city an early and favorable consideration of the same by the legislature."

That even after the passage of said act of 1880, it was, under sections 10 and 12 of said act of 1880 and said acts of 1878 and 1879, within the power of said city of Newburyport to establish a water system of its own; and, by voting so to do, and by carrying out the other provisions of section 12 of said act of 1880, to render
3 inoperative said act of 1880, creating and establishing said Newburyport Water Company.

On information and belief that said city of Newburyport did not accept said act of 1879, or otherwise comply with the provisions of said act of 1880 enabling it to establish a water system of its own; and that said acts of 1878 and 1879 became void, as provided in section 12 of said act of 1880.

4. That the said act of 1880 was obtained by the incorporators of said Newburyport Water Company, the plaintiff, with the co-operation, assent and assistance of said City of Newburyport, defendant; that the said act was thereupon duly accepted by the incorporators named therein, and that thereupon a water supply system was duly established and operated as provided in said act; that under date of Aug. 17, 1880, a contract was made, in accordance with the provisions of section 8 of said act of 1880 (chapter 235) between said Newburyport Water Company and said City of Newburyport, a copy whereof, marked "Exhibit D," is hereto annexed and made part hereof; that by the terms of said contract, the right vested in said company to furnish water to said city, as therein provided, for the term of twenty years from such time as said company should have

so far completed its works as to be able to comply with the terms of said contract, and should notify said city that it was ready to furnish water according to said contract, and that said date should be not later than Jan. 1, 1882; that said date was, according to the provisions of said contract, afterwards fixed as Oct. 1, 1881; that by said act of 1880 and said contract the right vested in said company to furnish water to said city according to the terms, and for the compensation, agreed in said contract for twenty years from on or about Oct. 1, 1881, unless said city should purchase the property of said water company in accordance with section 11 of said chapter 235 of the Acts of 1880; that by said section it was provided that said city should have the right, at any time after ten years from such completion of said company's works, to purchase its entire property upon such terms as might be mutually agreed; and, in case of disagreement, the "*compensation*" for the entire property should be determined by commissioners; but such authority to purchase was
4 conditioned upon a vote in favor thereof by two thirds of the voters of said city present and voting; that no purchase or vote was ever made or taken or held under said section.

5. On information and belief, that on or about Aug. 30, 1880, the following question,

"Shall the City of Newburyport contract with the Newburyport Water Company for a supply of water for fire purposes for a term of twenty years, for the sum of six thousand dollars per annum, in accordance with terms of contract dated Aug. 17, 1880?"

was duly submitted to a vote of the voters of said city; that seven hundred and twenty-nine (729) of said voters voted "Yes," and that two hundred and twenty-six (226) of said voters voted "No;" that thereafter said contract was and remained in force until the delivery of the deed from said company to said city, dated Jan. 29, 1895, as hereinafter alleged.

6. Your orator avers that, under and by said acts of 1878, 1879 and 1880, and the said acts of the defendant relating thereto, and under and by said contract and said vote relating thereto, the exclusive right, at least as against said city, vested in said company to supply water to said city and its inhabitants, and also the exclusive right, at least as against said city, of eminent domain within the limits prescribed by said act of 1880; subject only to said city's right to purchase after ten years, and the reserved right set forth in Massachusetts Public Statutes, chap. 105, sect. 3, quoted below; and that by said acts of defendant, said defendant contracted with plaintiff not to compete with plaintiff in furnishing water to said city and its inhabitants, and not to apply to said general court for any legislation authorizing such competition, especially during said term of twenty years from on or about Oct. 1, 1881, and became estopped to deny that plaintiff had such exclusive rights of supply and eminent domain.

Said provision in section 3 of Public Statutes, chapter 105, is as follows:

"SECT. 3. Every act of incorporation passed after the eleventh day of March in the year eighteen hundred and thirty-one shall be subject to amendment, alteration, or repeal at the pleasure of the general court; but the corporation, notwithstanding such repeal, shall be subject to the provisions of sections forty-one and forty-two;"

Said section 41 is as follows:

"SECT. 41. Every corporation whose charter expires by its own limitation, or is annulled by forfeiture or otherwise, or whose corporate existence for other purposes is terminated in any other manner, shall nevertheless be continued as a body corporate for the term of three years after the time when it would have been so dissolved, for the purpose of prosecuting and defending suits by or against it, and of enabling it gradually to settle and close its concerns, to dispose of and convey its property, and to divide its capital stock, but not for the purpose of continuing the business for which it was established."

Said section 42 provides for a receiver where necessary.

7. On information and belief, that the defendant, on or about Nov. 30, 1892, presented a petition to said general court, praying, in effect, said general court for an act to authorize said city to compete with said company in furnishing water to said city and its inhabitants, without buying the plant of said company as provided in said act of 1880, and said contract dated Aug. 17, 1880, or otherwise; that said petition was in contravention of said company's vested rights under said act and contract, and also in contravention of the policy theretofore and thereafter existing in said Commonwealth, to wit, not to authorize any city or town to compete, in furnishing water, gas or electric light therein, with any private corporation engaged, with the consent of such city or town, in furnishing the same therein; and that said city endeavored to obtain the enactment of a bill framed in conformity with said petition and to authorize said city as aforesaid; that the following is a copy of said petition:

"To the honorable senate and house of representatives of the Commonwealth of Massachusetts, in general court assembled:

The undersigned petitioner, Orrin J. Gurney, mayor of the city of Newburyport, pursuant to an order of the city council of said city instructing him so to do, respectfully petitions for an act authorizing the city of Newburyport to supply itself and its inhabitants with water for fire, domestic, manufacturing, and other uses, and to construct a system of water works, with the right to take water, lands and water rights, and to incur a water debt therefor.

ORRIN J. GURNEY, *Mayor.*

Newburyport, Nov. 30, 1892."

8 That said petition was referred to the committee on water supply; that hearings were held by said committee; that said

company opposed said petition and opposed the passage of any act authorizing said city to compete with said company in furnishing water as aforesaid; that the opposition of said company was not wholly successful; that as a result of said petition and said opposition said general court enacted chapter 471 of the Acts and Resolves passed by the general court of Massachusetts in the year 1893; that as a result of said opposition by said company the provisions of sections 12 and 13 of said act were added to the provisions petitioned for as aforesaid by said city; and that said sections provided for the possibility of a sale by said company of its plant to said city.

A copy of said act of 1893 (chapter 471) is hereto annexed, marked "Exhibit E."

8. On information and belief, that on the twenty-fifth day of August, 1893, the citizens of said city of Newburyport who were qualified to vote on municipal affairs were called upon to give in their ballots, "Yes" or "No," in answer to the question, "Shall the city purchase the corporate property and all the rights and privileges of the Newburyport Water Company, upon the terms and conditions contained in section 12 of chapter 471 of the Acts of 1893?" That the result of such vote was as follows:

The whole number of votes cast was	1,636
"Yes" had three hundred and sixty-two	362
"No" had one thousand two hundred and sixty-six	1,266
Blanks had eight	8

That on the seventh day of September, 1893, the citizens of said city of Newburyport who were qualified to vote on municipal affairs were called upon to give in their ballots, "Yes" and "No," in answer to the question, "Shall the city of Newburyport accept chapter 471 of the Acts of 1893, authorizing the city of Newburyport to establish and maintain a system of water supply for domestic and other uses?" That the result of such voting was as follows:

Whole number of votes cast was	1,583
"Yes" had one thousand four hundred and sixty-three	1,463
"No" had one hundred and fifteen	115
Blanks had five	5

7 That thereupon and thereafter it was claimed by the defendant that said chapter 471 of the Acts of 1893 was duly accepted and became effective, and that the defendant had the right thereunder to supply said city and its inhabitants with water and to receive revenue therefor; that in this condition of affairs said city of Newburyport threatened thereupon to establish a system of water supply for said city of Newburyport and the inhabitants thereof, and to compete with and ruin plaintiff, The Newburyport Water Company, and that thereupon, plaintiff, The Newburyport Water Company,—fearing that said act of 1893 might be held to have been legally accepted, and fearing that the property of said company

would be damaged, ruined and destroyed by such threatened action of said city under said act of 1893,—presented to said general court on or about the — day of ——, 1893, a petition praying for the passage of an act providing and requiring that said city should, before proceeding to supply water to itself or its inhabitants under said act of 1893, purchase the entire property of said company, or that, in some other suitable way, said company might be compensated for the damage resulting from the threatened competition by said city; that a copy of said petition, marked, "Exhibit F," is hereto annexed and made part hereof; that with said petition said company presented a form of bill entitled "An act to provide for the purchase of property of the Newburyport Water Company by the city of Newburyport," a copy whereof, marked "Exhibit G," is hereto annexed and made part hereof; that said petition was referred to the committee on water supply; that said committee held hearings upon said petition, and that at such hearings both plaintiff and defendant herein were represented; that, during the pendency of said petition, said city—by its mayor counsel and otherwise—threatened to compete with said water company in supplying water to said city and its inhabitants, and to ruin said company by such competition; that such competition would have greatly damaged said water company and would have ruined said company; that, as the result of the opposition and contentions made by said city to said general court or legislature of 1894, said company was unable to obtain the enactment of said bill or act, a copy whereof appears annexed hereto as said Exhibit G; that without the assent, and against the con-
8 tentions, of said water company before and to said general court or legislature, an act in lieu of said proposed act was passed by said general court or legislature, and constitutes chapter 474 of the Acts and Resolves passed by the general court of Massachusetts for the year 1894, a copy of which, marked "Exhibit H," is hereto annexed and made part hereof.

9. That by the terms of said act of 1894 (chapter 474) said city was authorized to compete with said company in supplying water to said city and the inhabitants thereof unless said water company should notify in writing the mayor of said city within thirty days after the passage of said act that it, the said water company, "desires to sell to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water," and unless said company should, within twenty days after the vote provided for in section 1 of said act of 1894, "deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid."

That said act also provided (section 1) that "said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same;" that said act was approved June 14, 1894; that on July 10, 1894, a special meeting of stockholders

of the said water company was held pursuant to a call and notice, a copy whereof is as follows:

"*Special Notice to the Stockholders of the Newburyport Water Co.*

NEWBURYPORT, *July* 3, 1894.

Notice is hereby given that a special meeting of the stockholders of the Newburyport Water Company will be held at Fraternity hall, Pleasant street, in the city of Newburyport, Massachusetts, on Tuesday, the 10th day of July, 1894, at 10 o'clock in the forenoon, to decide whether the company will offer to sell to the city of Newburyport all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants
9 thereof with water, as provided in section one of chapter four hundred seventy-four of the acts of the legislature of Massachusetts for the year eighteen hundred and ninety-four, and will authorize some suitable person or persons to notify the mayor of said city thereof in writing as provided in said section.

Per order of the board of directors of the Newburyport Water Company.

W. HERBERT NOYES, *President.*

JOHN E. McCUSKER, *Clerk.*"

That the number of shares of stock in said company was and is three thousand; that seventeen hundred and fifty-three shares were represented at said meeting by the stockholders present in person or by proxy; that some of the absent stockholders received no notice of such meeting; that the following vote was passed at said meeting:

"*Voted.* That this company desires to sell to the city of Newburyport, Massachusetts, all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water; and John E. McCusker, the clerk of the company, is hereby authorized and directed to notify the mayor of said city within thirty days from the fourteenth day of June, 1894, in writing, that the company so desires agreeably to the provisions of chapter 474 of the Acts of the legislature of Massachusetts for the year 1894, and the president and treasurer of said company are hereby authorized and directed, in case said city shall vote to purchase said property as provided by said act to execute and deliver to said city, within twenty days after said vote of said city, proper deeds and instruments in writing, conveying to said city the property aforesaid."

That pursuant to the provisions of said act of 1894 (chap. 474

sect. 1) notice was thereupon, on or about July 10, 1894, sent by said Newburyport Water Company, a copy of which notice, marked "Exhibit I," is hereto annexed and made part hereof.

That on or about Jan. 15, 1895, the following question,

"Shall the City of Newburyport purchase all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by the Newburyport Water Company, and used in supplying said city and the inhabitants thereof with water?"

was duly submitted to the vote of the legal voters of said city, in accordance with the provisions of section 1 of said chapter 474 of the Acts of 1894, and resulted as follows:

"Yes" had twelve hundred thirty-one	1,281
"No" had one hundred thirty-one	131
Blanks had six	6

That on or about Jan. 29, 1895, said Newburyport Water Company duly executed and delivered to said city a proper deed and instrument in writing, conveying to said city the property described in section 1 of said chapter 474 of the Acts of 1894; that said deed specifically conveyed (in the fifteenth paragraph thereof) said contract between said company and said city, dated Aug. 17, 1880; that said deed described the corporeal property conveyed in great detail, as will appear by reference thereto; that, in addition to said detailed description said deed contained (in paragraph 26 thereof) the following description of corporeal and incorporeal property conveyed:

"26. All the rights, privileges and easements heretofore acquired under chapter 235 of the Acts of the legislature of Massachusetts for the year 1880, and now used by said company, of laying and maintaining water pipes and mains in said streets, and of making connections therewith for the purpose of supplying said city and the inhabitants thereof with water, and all property, property rights, corporate property, privileges, easements, waters and water rights of said company, whether herein particularly described or not, and all the rights and franchises of said company, whether for supplying water to the city of Newburyport and the inhabitants thereof, and of collecting water rates therefor or otherwise.

Hereby conveying to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water."

That a copy of said deed and instrument in writing, marked "Exhibit J," is hereto annexed and made part hereof; that said deed was duly accepted by said city; and that a vote was passed by the board of alderman of said city on Jan. 31, 1895, a copy of the record of which vote, marked "Exhibit K," is hereto annexed and made

part hereof; and that thereupon said city took possession of
11 all the property described in said deed, and still retains possession thereof and collects revenue therefrom.

10. Your orator further avers that the action of said water company detailed in the next preceding paragraph hereof, and resulting in said conveyance dated Jan. 29, 1895, was voluntary in name and form only, and was in fact compulsory; and that said offer of sale and deed were made by said company to said city of Newburyport "under the threat of municipal competition" by said city, and to avoid the ruin which would have resulted from such competition by said city; and that the said acts by which said city came into and obtained possession of the property described in said deed constituted a taking of such property in violation of the rights secured to plaintiff by the Constitution of the United States.

11. That the plaintiff, The Newburyport Water Company, and defendant, The City of Newburyport, were unable to agree upon the price to be paid for the said property purchased by said city and conveyed to it as aforesaid, and that the said Newburyport Water Company thereupon, on or about the seventh day of February, 1895, petitioned the supreme judicial court for the county of Essex in said Commonwealth to appoint three commissioners according to the provisions of said chapter 474 of the Acts of said year 1894, to determine such price; that commissioners were duly appointed by said court; that hearings were by them held from time to time, and that on or about Feb. 3, 1897, said commissioners made a report to said supreme judicial court, showing, amongst other things, exactly that portion of the property described in said deed which was included in the sum of $275,000, awarded by said commissioners to said company under its petition to said supreme judicial court, and showing that all other property and elements of value were excluded from said award; that from said report it appears that property described in said deed and required by the terms of said act of 1894 to be included therein, and found by said commissioners to be of value (and which is hereinafter alleged to be of the value of more than $475,000), was not allowed for at all in making said award, and that under said award said company would receive no compensation therefor;
12 that said commissioners reported the following as to what was included in and excluded from said award, and the claims made regarding the same:

"Sect. 1, chap. 474, in terms directs us to put a fair value upon the property for the purposes of its use by the city, and further provides that this value shall not be enhanced on account of the future earning capacity or good will, or the franchise of the company. To determine the fair value of the property for the purpose of its use by the city, as to any part that had any value in use to the city, we have valued the same at its value for that use at the time of the transfer. We have, as we think the statute so directs us, excluded from consideration the future earning capacity and good will of the plant, *and have not valued any franchise right whatever which the company owned or held at the time of the transfer, except its rights to take water*

as required and exercised by the taking under sect. 2, chap. 235, Acts of 1880. Neither have we, for the same reason, taken into consideration the earning capacity, whether past, present or future, or any income which the company had or might have derived from its plant.

Subject, then, to these rules we have valued the property *in its entirety* as a plant in full operation, engaged in supplying its water for domestic and municipal purposes, and in so doing we have taken into consideration the following elements of valuation, *and excluded all others:*

1. Cost of reproduction of all that part of the physical plant used in pumping and delivering water, less any depreciation. This method was employed without objection by all the experts who testified.

We have further valued the following:

2. All lands and buildings and easements in and to lands used for piping, and other appliances of the water company, not included within the real estate connected with the pumping station.

3. The personal property.

4. All books and plans conveyed to the city.

5. Water collected in the reservoir and wells upon the date of the transfer.

6. The water right of the company, taking into account not only the land, reservoir, dams and everything else that created the water right, but also the quantity and quality of water that gathers at this point, and its adaptability to the purposes for which it was in use when sold.

We have valued this right at what we have deemed it was worth for the purposes of its use by the city, taking into account its capacity, adaptability, usefulness, and connection with and relation to the plant, and having regard to the fact that we are valuing not what income its water had yielded or might yield in conjunction with the rest of the property, but the value of the right to have
13 water gather at this place to be used for such purposes. It appeared upon the evidence presented that there was only one other practical source of supply that could be availed of to supply the city and its inhabitants with the same quantity of water that had been supplied by the company, and some question was made as to the quality coming from this source. We heard evidence offered as to the probable cost of creating and maintaining a water right at this source to take the place of the water right used by the company, and, with the other elements above referred to, have taken this evidence into consideration in passing upon the value of the water right conveyed to the city.

7. We further find that the plant was a going concern and in full operation at the time of the transfer,—one that had been tested by experience and with which the city could begin the immediate prosecution of the business of supplying water to the established connections for domestic and municipal purposes (including in the latter hydrant service); and upon an examination of these facts, are

of opinion that the property had a greater value, for the purposes of its use by the city, by reason thereof, than as if the plant had not been in full operation, and that this should be considered in passing upon the value of the entire plant. This enhancement we have fixed upon as adding to the value of the property the sum of $40,000. In passing upon the same, *we have not made the income derived from the business its element or basis, or any other factor than that above stated.*

Upon consideration, therefore, of all the foregoing elements of value, *and excluding every other*, we find that the fair value of the property of the company for the purposes of its use by the city, upon Jan. 29, 1895, was two hundred and seventy-five thousand dollars ($275,000), with interest from that date." (Report of Commissioners, pages 3–5.)

Said report also contained the following:

"At the argument the petitioner contended and asked us to adopt the following propositions:

1. That the statute of 1893, chap. 471, never took effect, because the city had failed and refused to pass the vote to purchase the property of the Newburyport Water Company, as provided in sect. 12 of that act. (It was admitted that under that act the city duly passed a vote, Aug. 25, 1893, refusing to purchase the corporate property of the Newburyport Water Company, and that Sept. 7, 1893, it duly passed a vote to accept said act of 1893. It was claimed by the defendant that the City of Newburyport, by virtue of and upon such vote of acceptance, was thereupon authorized to establish and maintain a system of water supply under and according to said act of 1893.)

2. That the City of Newburyport acquired from the Newburyport Water Company all the incorporeal, as well as the corporeal, property of said company, including therein all the rights, franchises, easements, and privileges of every description, belonging to said company.

3. That by statutes of 1894, chap. 474, the water company was authorized to sell, and the city was bound to buy: (1) All the rights; (2) all the privileges; (3) all the easements; (4) all the lands; (5) all the water; (6) all the water rights; and (7) all the structures, pipes, machinery and other personal property used in supplying the city and its inhabitants with water. That such construction should be given to the statute as that every one of these words should have its full force and meaning; that none of them should be treated as vague and meaningless words; but assuming that they were put into the act as meaning something, that, if possible, such construction should be given to the statute as should give force and meaning to every one of these words in connection with the other words of the statute.

4. That the term 'rights and privileges' in sect. 1, chap. 474, Acts of 1894, included the right of the company to distribute water and collect water rates; that it did not mean or include the franchise of the company to be a corporation; and that the term 'franchise,' as

used in the last sentence of section 1, should be construed as meaning only the franchise to be a corporation, or the charter of the corporation.

5. That the last sentence of said section 1 did not preclude the commissioners from considering either the past or future earning capacity of the water company in determining the value of the property for the purposes of its use by the city of Newburyport, and that the past earning capacity of the company should properly be considered by the commissioners in determining the value of the corporate property for its use by the city; that the term 'good-will,' used in the same sentence of section 1, meant such peculiar and additional value as might pertain to the property by reason of the fact that the city succeeded to the business as conducted by the water company.

6. That the term 'the fair value of said property for the purposes of its use by the said city' entitled and required the commissioners to determine what could fairly be realized by said city from said property, and to award an amount which should represent the fair value of the property, including therein all the incorporeal rights, privileges and franchises belonging to said company.

We may assume that in so far as the propositions contained in the first three clauses are concerned, they are correct, and the definition of 'good will' set forth in the fifth clause we accept. Our estimation of the value of the property, however, is based upon the theory that, *whether or not the company vested everything in the city*, described in clause 2, we still remain of the opinion that the elements of valuation which we have already therein stated are all that we can take into consideration in making our award, and we have therefore confined ourselves strictly to these elements of valuation, and do not include anything else. Upon the petitioner's request, we further add that, at the time of the transfer, the company, acting under chapter 235, Acts of 1880, had, since 1881, laid down in the streets of the city of Newburyport many miles of its piping, its hydrants, and other appliances used in connection with the water plant.

In estimating the value of the property transferred we allowed for the cost of reproducing this piping, these hydrants, and other appliances, as appears in clause 1 of our elements of valuation; but we have not, in that element or in any other of the elements of valuation, taken into consideration or valued the exercise of this right, or the right itself, to so use the streets up to the time of the transfer; and whether or not we should so value we leave to the determination of the court, further stating that upon the evidence presented to us, the exercise of this right and the right itself was valuable." (Report of Commissioners, pages 13–15.)

12. On information and belief, that said report and award came on to be heard before a single justice of said supreme judicial court, and that said justice, on or about Feb. 10, 1897, reserved for the determination of the full court the question whether the award should be recommitted, and whether it should be accepted; that

thereafter said report and award of said commissioners were argued before, and considered by, the full court; that in such argument those who represented said company did not present or argue any claims or rights, under the Constitution of the United States, of said Newburyport Water Company, or of its stockholders generally, or of such of its stockholders as did not assent to the alleged sale and conveyance, or to the alleged offer in pursuance of which said sale and conveyance purport to have been made, and were not notified of the said special meeting of stockholders, and were not present, in person or by proxy, at said meeting, and have never assented to said alleged offer, sale or conveyance, or to any delivery thereunder of property of said Newburyport Water Company to the City of Newburyport; that thereafter, to wit, on or about June 14, 1897, said full court, by Holmes, J., rendered a decision and opinion confirming and accepting said award of the commissioners, and holding in effect that, even if the offer, sale and deed by said water company included, under the terms of said act of 1894, the corporeal and incorporeal property of said water company, including all its franchises (excepting, possibly, its right to be a corporation),
16 yet, under said act, said city was not bound to pay anything for the rights, and the exercise of rights, belonging to said company, which said commissioners had found and reported to be valuable, but not included in said award of $275,000.

A copy of said opinion, marked "Exhibit L," is hereto annexed and made part hereof.

That thereafter, on or about the — day of ——, 1897, said Newburyport Water Company filed in the supreme judicial court for the Commonwealth, in the county of Essex, a petition for re-hearing upon the points including, in substance, the following:

The said offer by the water company to sell was made under the threat of municipal competition by said City of Newburyport, and to avoid ruin, and was voluntary only in name; that said water company was not seeking to sell, and would not have sought to sell, had not said City of Newburyport declared its purpose to destroy the value of the corporate property of said water company, and that said company was compelled to act under said statute of 1894 to save what it could under that statute.

That said act of 1894, as construed in its decision and opinion, is repugnant to article 5 of the amendments to the Constitution of the United States, and deprives said water company of vested rights of property without just or reasonable compensation; that said water company relied, before said commissioners, and before said supreme judicial court, upon a construction of the statute of 1894 of said act of 1894, chapter 474, which made it unnecessary to raise these questions; that said water company supposed there was no question, but that the action of the petitioner in selling to the City of Newburyport would be regarded and taken as in effect compulsory, and that its right to compensation would be amply secured by a construction of said act of 1894, which assumed that the city had

in effect taken the property by the exercise of the right of eminent domain.

That said petition is still pending, and that it is doubtful whether or not the plaintiff herein was not and is not precluded from contesting in said cause pending in said supreme judicial court the constitutionality of said act of 1894, by reason of the fact that said proceedings were instituted by the petitioner under said act; that the time within which plaintiff had a right to avail itself of said statute was limited to thirty days, as above alleged; that as the constitutionality of said act might be eventually established, the
17 only safe course for said company to pursue was to file a petition under said act of 1894, as was done; that under the construction of the act contended for by the plaintiff herein before said commissioners and in said supreme judicial court, it would not have been open to plaintiff to claim that any of its property was taken without just compensation; that the provisions of said act of 1894 relating to value were novel; and that such construction as was placed thereon by said decision and opinion was wholly new, and was unexpected; and plaintiff claims that the said act of 1894, and said act of 1893 as re-enacted by said act of 1894, were in violation of the rights of plaintiff, The Newburyport Water Company, under the Constitution of the United States, as is hereinafter more specifically claimed; and that the exigency for questioning the constitutionality of said acts did not arise until after said decision and opinion were rendered as aforesaid.

13. Your orator further avers and shows and claims, that under said act of 1894, any so called purchase by said city from said company was a purchase, as an entirety, of "*all the rights, privileges*, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water;" that the corporeal and incorporeal parts of said property were and are inseparable; that the terms "*all* the rights, privileges * * * owned by said company," in said act of 1894 and in said deed, comprised *all* the franchises, or franchise rights, of said company, except possibly its right of corporate life; that the acceptance of said deed by said city was an acceptance and taking of *all* the property (including said rights and privileges and the contract between said company and said city) described in said deed; that said contract was a part of said "rights * * * owned by said company and used in supplying said city * * * with water;" and that by the terms of said act it was provided that "said city shall pay to said company the fair value *thereof*, to be ascertained as hereinafter provided."

14. Your orator further avers and claims

(*a.*) That the effect of said act of 1894, and said act of 1893 as re-enacted by said act of 1894, under the circumstances alleged,
18 and as construed by said supreme judicial court in said opinion, was to take by law the property of said company (to wit, that portion of the property described in said deed, a copy whereof

is annexed hereto, marked "Exhibit J," which was not included in the property valued by said commissioners in their award of $275,000) without the actual consent of said company and of its stockholders, and of each of them, and to give it to said City of Newburyport, and to enable said City of Newburyport thereby to take the same from plaintiff; that, whether such taking was direct or indirect, it was a taking of the private property of said company and of its stockholders for public use, and without just compensation—without any compensation whatever—for the property so taken, and was in violation of article 5* of the amendments to the Constitution of the United States, and of plaintiff's rights thereunder.

*(*b.*) That said legislation, as so construed, deprived and deprives plaintiff of its property without due process of law, in violation of said article 5 of amendments to the Constitution of the United States, and of plaintiff's rights thereunder.

*(*c.*) That said legislation, as so construed, impaired and impairs the obligation of contracts belonging to said company and to its stockholders, in violation of section 10 of article 1 of the Constitution of the United States, and the plaintiff's rights thereunder.

*(*d.*) That by said legislation, as construed as aforesaid, the State or Commonwealth of Massachusetts denied and denies to plaintiff and its stockholders the equal protection of the laws, in violation of article 14 of the amendments to the Constitution of the United States, and of plaintiff's rights thereunder.

(*e.*) That whether or not said act of 1894 was otherwise constitutional,—according to the construction placed thereon by said decision,—the intention of said general court or legislature in enacting the same was to give and transfer incorporeal property of the plaintiff to defendant, The City of Newburyport, without any payment therefor to plaintiff, although under the charter of said water company, to wit, said chapter 235 of the Acts of 1880, it was provided that said city should have the right to purchase the property of said water company after ten years, by making compensation for said company's entire property; that said act of 1894, and said act of 1893 as re-enacted by the said act of 1894, as construed as aforesaid, are both and severally unreasonable and unjust to such a degree as to violate the rights of plaintiff under the Constitution of the United States; and plaintiff claims that said unreasonableness and injustice are established by the facts hereinbefore alleged, and also by the following facts; to wit, that said act of 1894, as construed,* provided in effect that no payment was to be made to said company for its right to use the streets of said city for laying pipes therein and distributing water therefrom; that said rights were acquired from said act of 1880 (chapter 235), and from said contract between said company and said city dated Aug. 17, 1880; that, as shown above, the city had the right to purchase the company's entire property only after ten years from Oct. 1, 1881, at the end of which period the corporeal property would be worth

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* See amendment, page 73.

somewhat less than when used,* while said rights, if the company's risk proved successful, would have become valuable; that when the act of 1894 was passed the net income of the company from the use of its corporeal and incorporeal property, including said rights (after paying all taxes and expenses) was over thirty thousand dollars; that this sum is equal to an investment of $750,000, at four per centum; that said commissioners value the property of the company, exclusive of these rights (excluding also from valuation said contract between the city and the company which plaintiff claims was included within the "rights" intended to be sold to the city), at $275,000, and that said rights (including said contract) were actually worth more than the difference between said sums of $750,000 and and $275,000, to wit, more than the sum of $475,000.*

15. Your orator further avers and shows, on information and belief, that on or about July 12, 1897, said City of Newburyport, although informed of the pendency of said petition for rehearing, authorized the issuance of bonds to the amount of $375,000, under said chapter 474 of the Acts of the Year 1894, and said chapter 471 of the Acts of the Year 1893, and threatens and intends to negotiate the same, and, out of the proceeds thereof, to tender to said water company the amount of said award and interest.

16. Your orator further shows that this is a suit of a civil nature in equity; that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arises under the Constitution of the United States.

Wherefore your orator prays:

First. That it may be adjudged and decreed that chapter 474 of the Acts and Resolves passed by the general court of Massachusetts, as construed as aforesaid by the supreme judicial court of Massachusetts,† is unconstitutional and in violation of the rights secured to your orator by and under the Costitution of the United States.

Second. That chapter 471 of the Acts and Resolves passed by the general court of Massachusetts in the year 1893 as re-enacted by said chapter 474 of the Acts of 1894, and as construed in said decision by the supreme judicial court of Massachusetts, in† unconstitutional and in violation of the rights secured to your orator by and under the Constitution of the United States.

Third. That the defendant has taken and holds the property described in said deed, marked "Exhibit J," in violation of the rights secured to plaintiff by the Constitution of the United States.

Fourth. That it may be decreed and ordered that said deed be cancelled and be given up to plaintiff, and the property received thereunder by defendant be restored to plaintiff.

Or, in the alternative thereof,

Fifth. That it be decreed and ordered that defendant reconvey and restore to plaintiff all the corporeal and incorporeal property described in said deed marked "Exhibit J."

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* See amendment, pages 73, 74.
† See amendment, page 74.

Sixth. That the damages suffered by plaintiff for the wrongful taking, detention and use by defendant of the property described in said deed marked "Exhibit J," and for all waste or loss suffered by plaintiff in respect to the same, may be ascertained and declared; and that it may be adjudged, decreed and ordered that defendant shall pay to plaintiff the amount thereof.

Or, in the alternative thereof,

21 *Seventh.* That in case this court should decide that the defendant may be permitted to retain the property described in said deed, upon paying to plaintiff just compensation for the entire property taken and received by defendant from plaintiff, the amount of such just compensation may be ascertained and declared, and that it may be adjudged, decreed and ordered that defendant pay to plaintiff the amount of such just compensation.

Eighth. That the defendant be restrained from making, executing, negotiating and issuing any bonds under the provisions of said act of 1894, relating to the issue of bonds; and also from attempting in any way to enforce said award; also that defendant be restrained from extending, changing, altering, parting with, or wasting in any way, the system and plant and property described in said deed; and from paying out for any purpose but the purpose of operating said system and plant any of the funds or revenue arising out of said system, plant and property.*

Ninth. That a receiver may be appointed to take charge of the property described in said deed, and comprising the plant which said deed purports to convey, and to operate the same under the direction of this court, until the determination, under this bill of complaint, of the rights and title of the respective parties hereto, to the property described in said deed.

Tenth. And that your orator may have such other, or further, or different relief in the premises as to a court of equity may seem meet.

To the end, therefore, that the said defendant may, if it can, show why your orator should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make, to the best and utmost of its knowledge, remembrance, information and belief, to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated, paragraph by paragraph, and they were specially interrogated thereunto, may it please your honors to grant unto your orator a *subpœna ad respondendum* issuing out of and under the seal of this honorable court, to be directed to the said defendant,

22 The City of Newburyport, commanding it on a certain day, and under a certain penalty to be therein inserted, to appear before your honors in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises; and, further, perform and abide by such further order and decree as to your honors shall seem meet; and also a writ of provisional and

*See amendment, page 74.

a writ of perpetual injunction to the same purport, tenor, and effect, as is hereinbefore set forth and prayed.

And your orator, as in duty bound, will ever pray, etc.

NEWBURYPORT WATER COMPANY,
By W. HERBERT NOYES, *President.*

LAURISTON L. SCAIFE,
Solicitor for Complainant.
ROBERT M. MORSE,
LAURISTON L. SCAIFE,
Of Counsel.

UNITED STATES OF AMERICA,
District of Massachusetts, Suffolk County.

W. Herbert Noyes, being duly sworn, says: That he is president of The Newburyport Water Company, the complainant in the foregoing bill of complaint, and knows the contents thereof; that the allegations therein contained, as far as they relate to his own acts, are true, and as far as they relate to the acts of others, he believes them to be true.

That in regard to all matters and things in the foregoing bill of complaint alleged, which are not within the personal knowledge of this deponent, the deponent has been fully informed, and he believes that the same are true.

W. HERBERT NOYES.

Sworn to before me this nineteenth day of July, 1897.
[SEAL] HENRY S. MacPHERSON,
Notary Public.

23 EXHIBIT A.

Acts and Resolves Passed by the General Court of Massachusetts in the Year 1880.

Page 184, chapter 235.

An act to incorporate the Newburyport Water Company.

Be it enacted, etc., as follows:

SECTION 1. Joseph B. Morss, William H. Huse, Edward F. Coffin, Edward P. Russell, Henry M. Cross and Lawrence B. Cushing, their associates and successors, are hereby made a corporation by the name of the Newburyport Water Company, for the purpose of furnishing the inhabitants of Newburyport with pure water for the extinguishment of fires, and for domestic and other purposes; with all the powers and privileges, and subject to all the duties, restrictions and liabilities set forth in all general laws which now are or hereafter may be in force, applicable to such corporations.

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SECT. 2. Said corporation, for the purposes aforesaid, may take and hold the water, or so much thereof as may be necessary, not exceeding one and a half million of gallons daily, of any springs, natural ponds or brooks within the limits of said city, or of Kimball's pond, in the towns of Amesbury and Merrimac, or any of the effluents from said pond, or from the Powow river, in said town of Amesbury and the town of Salisbury; and may convey said waters, or any part thereof, into and through said city and said towns of Amesbury and Salisbury; and may take and hold, by purchase or otherwise, any real estate necessary for the raising, preservation and purity of the same, or of forming dams or reservoirs to hold the same, and for laying and maintaining aqueducts and pipes for distributing the waters so taken and held in any and all parts of said city and towns of Amesbury and Salisbury; and may lay its water pipes through any private lands, with the right to enter upon the same and dig therein for the purpose of making all necessary repairs or service connections; and for the purposes aforesaid may carry its pipes under or over any water course, street, railroad, highway or other way, in such manner as not to obstruct the same; and may enter upon and dig any road or other way for the purpose of laying or repairing its aqueducts, pipes or other works; and in general may do other
24 acts and things convenient or proper for carrying out the purposes of this act. In case either of the towns in which said Kimball's pond is situated should hereafter apply for authority to take water from the same, the powers hereby granted shall not be construed as creating any priority of right, or operate in the prejudice of such application.

SECT. 3. Said corporation may declare the quantity of water proposed to be taken under this act, not exceeding one and a half million of gallons daily, not less than three months before the waters shall be withdrawn from said springs, ponds or brooks; and within sixty days from the time it shall take any lands, springs, ponds or brooks for the purpose of this act, otherwise than by purchase, said corporation shall file in the registry of deeds for the southern district of the county of Essex a description of such lands, springs, ponds, brooks or water, sufficiently accurate for identification, and state the purposes for which it is so taken, and the title of any land so taken shall vest in said corporation; and upon such filing the terms shall be the measure and limit of the right of said corporation to take and divert the waters of such springs, ponds or brooks; but if no such notice is filed, said measure and limit shall be one and a half million of gallons daily. If at any time said corporation shall take a larger quantity of water than said limit it may be restrained by injunction from taking such larger quantity, in a suit in equity brought by any party interested.

SECT. 4. Any person or corporation injured in any way by any acts of said corporation under this act, and failing to agree with said corporation as to the amount of damages, may have the same assessed and determined in the manner provided when land is taken for highways; but no application shall be made to the county com-

missioners for the assessment of damages for the taking of water rights until the water is actually taken and diverted by said corporation. Any person whose water rights are thus taken or affected may apply as aforesaid within three years from the time the water is actually withdrawn or diverted, and not thereafterwards, and no suit for injury done under this act shall be brought after two years from the alleged date of the receipt of injury.

SECT. 5. If said corporation takes the water from Kimball's pond or any of its affluents, or from Powow river, it shall lay its aqueduct or main pipe for conducting the same to said city by some convenient route through the town of Amesbury. The inhabitants of any town upon the line of the works authorized by this act, upon the application of its board of selectmen, shall be entitled to the reasonable use of the water, for the same uses as are hereinbefore provided, upon paying an equitable compensation therefor, which in case of difference shall be determined by three commissioners, to be appointed by the supreme judicial court, upon application of either party and notice to the other, whose award when accepted by the court shall be binding upon the parties for the term of five years.

SECT. 6. Any town under whose roads, streets or ways said corporation lays its aqueducts or main pipe may require said corporation to insert therein proper hydrants, at points not less than five hundred feet apart, to be used for extinguishing fires, and for no other purpose. The expense of inserting said hydrants and keeping the same in repair shall be paid by such town.

SECT. 7. If any person shall use any water taken under this act without the consent of said corporation, or shall wantonly or maliciously divert the water, or any part thereof, taken or held by said corporation pursuant to the provisions of this act, or corrupt the same or render it impure, or destroy or injure any dam, aqueduct, conduit, pipe, hydrant, machinery or other works or property held, owned or used by said corporation, under the authority of and for the purposes of this act, he shall forfeit and pay to said corporation three times the amount of damage assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid may be also punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year.

SECT. 8. Said corporation may distribute the water through said city of Newburyport; may establish and fix from time to time rates for the use of said water and collect the same; and may make such contracts with the said City of Newburyport or with individuals or corporations to supply water for fire or for other purposes as may be agreed upon by said city or individuals or corporations, and said corporation; *provided* that the source of supply, the size and quality of the pipes to be used, shall be approved by the board of water commissioners to be appointed under the provisions of this act. The City of Newburyport is hereby authorized to contract for a supply of water for fire purposes for a term of years with

said Newburyport Water Company; *provided*, the same is assented to by said city by a majority vote of the voters present and voting thereon at a legal meeting called for that purpose.

SECT. 9. Said corporation, for the purposes set forth in this act, may hold real and personal estate, and the whole capital stock shall not exceed three hundred thousand dollars, to be divided into shares of one hundred dollars each.

SECT. 10. The City of Newburyport is hereby authorized to appoint a board of water commissioners, to consist of five citizens of said city, who shall be chosen by the city council by joint ballot of both branches, whose duties it shall be to investigate all questions relative to the introduction of pure water into said city; to ascertain the cost of the same, and to report the result of the investigation and deliberations upon the same to the city council, at least ten days prior to the time appointed by section twelve of this act for said city, to vote upon the acceptance of chapter two hundred and forty of the acts of the year eighteen hundred and seventy-eight. They shall serve without compensation, but the necessary expenses and liabilities incurred in the employment of engineers and personal examination of various systems of water supply shall be defrayed by said city; and the city council shall appropriate such sum or sums of money as may be needed for this purpose, and in the same manner as money is appropriated for other city purposes.

SECT. 11. The City of Newburyport shall have the right at any time after ten years from the date of the completion of said works to purchase the corporate property and all the rights and privileges of said company at a price which may be mutually agreed upon between said corporation and the said City of Newburyport; and the said corporation is authorized to make sale of the same to said city. In case said corporation and city are unable to agree, then the compensation to be paid shall be determined by three commissioners to be appointed by the supreme judicial court upon application of either party, and notice to the other, whose award when accepted by the court
27 shall be binding upon both parties. And this authority to purchase said franchise and property is granted on condition that the same is assented to by said city by a two-thirds vote of the voters present and voting thereon at a meeting called for that purpose.

SECT. 12. In case the City of Newburyport shall accept chapter two hundred and forty of the acts of the year eighteen hundred and seventy-nine, within two months from the date of the passage of this act, and shall also within three months after so accepting the same vote to construct the works contemplated therein, and to raise and appropriate the necessary sum of money therefor, this act shall be inoperative; otherwise this act shall take effect at and upon the expiration of the said two months, and the said chapter two hundred and forty of the acts of the year eighteen hundred and seventy-eight, as revived by chapter two hundred and forty of the acts of the year eighteen hundred and seventy-nine, shall become void.

Approved April 23, 1880.

Exhibit B.

Acts and Resolves of Massachusetts, 1878.

Chapter 240.

An act to supply the City of Newburyport with water.

Be it enacted, etc., as follows:

Section 1. The City of Newburyport is hereby authorized to supply itself and its inhabitants with pure water to extinguish fires, generate steam, and for domestic and other uses, and may establish public fountains and hydrants, and regulate their use, and may discontinue the same, and may collect such rents as may be fixed for the use of such water.

Sect. 2. Said city for the purposes aforesaid may take and hold the water, or so much thereof as may be necessary, not exceeding one and a half million of gallons daily, of any springs, natural ponds or brooks within the limits of said city, or of Kimball's pond in the towns of Amesbury and Merrimac, or any of the effluents from said pond; and may convey said waters or any part thereof into and through said city and said town of Amesbury and
28 the town of Salisbury; and may also take and hold, by purchase or otherwise, all necessary lands for raising, holding, flowing, diverting, conducting and preserving such waters, and conveying the same to any and all parts of said city and of said towns of Amesbury and Salisbury; and may erect thereon proper dams, reservoirs, buildings, fixtures and other structures, and make excavations and embankments, and procure and run machinery therefor; and for such purposes may construct and lay down conduits, pipes and drains in, under or over any lands, water-courses, roads or railroads, and along any street, highway, or other way other than a railway, in such manner as not to unnecessarily obstruct the same; and for the purpose of constructing, laying down, maintaining and repairing such conduits, pipes and drains, and for all other purposes of this act, may dig up, raise and embank any such land, street, highway or other way, in such manner as to cause the least hindrance to travel thereon; and in general may do any other acts and things necessary or convenient and proper for carrying out the purposes of this act. In case either of the towns in which said Kimball's pond is situated should hereafter apply for authority to take water from the same, the powers hereby granted shall not be construed as creating any priority of right, or operate to the prejudice of such application.

Sect. 3. Said City of Newburyport may, by vote of its city council, declare the quantity of water proposed to be taken under this act, not exceeding one and a half million of gallons daily, such vote to be passed not less than six months before the waters shall be with-

drawn from said springs, ponds or brooks; and within sixty days from the time it shall take any lands, springs, ponds, brooks or water for the purposes of this act, otherwise than by purchase, said city shall file in the registry of deeds for the southern district of the county of Essex a description of such lands, springs, ponds, brooks or water, sufficiently accurate for identification, with a statement for the purposes for which the same are taken, together with a copy of such vote, if any has been passed, signed by the mayor of said city; and upon such filing, the terms of such vote shall be the measure and limit of the right of said city to take and divert the waters of such springs, ponds or brooks; but if no such vote is so passed
29 and filed said measure and limit shall be one and a half million of gallons daily. If at any time said city shall take a larger quantity of water than said limit, it may be restrained by injunction from taking such larger quantity, in a suit in equity brought by any party interested.

SECT. 4. Said City of Newburyport shall be liable to pay all damages that shall be sustained by any person or persons in their property by the taking of said waters or any part thereof as authorized by this act, or by the taking of any land, rights of way, water rights or easements, or by the erection of any dams, or the construction of any aqueducts, reservoirs, water ways or other works for the purposes of this act; and if the owner or owners of any property which shall be taken as aforesaid, or other person or persons sustaining damages as aforesaid, shall not agree on the damages to be paid therefor, he or they may apply by petition for an assessment of the damages at any time within three years from the taking of the said property, or the construction of dams or other works occasioning damages as aforesaid, and not afterwards, to the superior court in the county in which the same are situated. Such petition may be filed in the clerk's office of said court, in vacation or in term time, and the clerk shall thereupon issue a summons to the said City of Newburyport, returnable, if issued in vacation, at the next term of the said court to be held after the expiration of fourteen days from the filing of said petition, and if in term time, returnable on such day as said court shall order, to appear and answer to the said petition; the said summons shall be served fourteen days at least before the term or day at which it is returnable, by leaving a copy thereof and of the said petition, certified by the officer who shall serve the same, with the clerk of said city; and the said court may, upon default or hearing of said city, appoint three disinterested persons, who shall, after reasonable notice to the parties, assess the damages, if any, which such petitioner may have sustained as aforesaid; and the award of the said persons so appointed, or a major part of them, being returned into and accepted by the said court, shall be final, and judgment shall be rendered and execution issued thereon for the prevailing party, with costs, unless one of said parties shall claim a trial by jury as hereinafter provided.

SECT. 5. If either of the parties mentioned in section four
30 shall be dissatisfied with the amount of damage awarded as therein expressed, such party may, at the term at which such

award was accepted, or the next term thereafter, claim in writing a trial in said court, and have a jury to hear and determine at the bar of said court all questions of fact relating to such damages, and to assess the amount thereof; and the verdict of said jury being accepted and recorded by the said court, shall be final and conclusive, and judgment shall be rendered and execution issued thereon, and costs shall be recovered by the said parties respectively in the same manner as is provided by law in regard to proceedings relating to the laying out of highways.

SECT. 6. If said city takes the water from Kimball's pond or any of its effluents, it shall lay its aqueduct or main pipe, for conducting the same to said city, by some convenient route through the town of Amesbury. The inhabitants of any town upon the line of the works authorized by this act, upon the application of its board of selectmen, shall be entitled to the reasonable use of the water, for the same uses as are herein before provided, upon paying an equitable compensation therefor, which in case of difference shall be determined by three commissioners, to be appointed by the supreme judicial court upon application of either party, and notice to the other, whose award, when accepted by said court, shall be binding upon the parties for the term of five years.

SECT. 7. Any town under whose roads, streets or ways said city lays its aqueduct or main pipe may require said city to insert therein proper hydrants, at points not less than five hundred feet apart, to be used for the purpose of extinguishing fires, and for no other purpose. The expense of inserting said hydrants and keeping the same in repair shall be paid by such town.

SECT. 8. No application shall be made to the court for the assessment of damages for the taking of any water rights, or for any injury thereto, until the water is actually withdrawn or diverted by said city under the authority of this act.

SECT. 9. If any person shall use any water taken under this act without the consent of said city, or shall wantonly or maliciously divert the water, or any part thereof, taken or held by said city pursuant to the provisions of this act, or corrupt the same, or render it impure, or destroy or injure any dam, aqueduct, pipe, conduit,
31 hydrant, machinery or other works or property held, owned or used by said City of Newburyport under the authority of and for the purposes of this act, he shall forfeit and pay the said city three times the amount of damage assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid, may be also punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year.

SECT. 10. For the purpose of paying all necessary expenses and liabilities incurred under the provisions of this act, said city shall have authority to issue coupon bonds to be denominated "Newburyport water bonds," to be signed by the treasurer of said city, to an amount not exceeding two hundred and fifty thousand dollars, payable at periods not exceeding thirty years from the date thereof,

with interest payable semi-annually at a rate not exceeding six per centum per annum; and said city may sell said bonds at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper. And the city council of said city is hereby authorized from time to time to appropriate, grant and assess such sum or sums of money as shall be deemed expedient, towards paying said expenses, or the principal of the money so borrowed or obtained, and the interest thereof, in the same manner as money is appropriated, granted and assessed for other city purposes.

SECT. 11. The rights, powers and authority granted to the city of Newburyport by this act shall be vested in and exercised by a board of water commissioners, consisting of three citizens of said city, who shall be chosen by the city council, by joint ballot of both branches. The said commissioners shall, during their continuance in office, execute, superintend and direct the performance of all the works, matters and things mentioned in the preceding sections which are not otherwise specifically provided for in this act; and shall be subject to such ordinances, rules and regulations, in the execution of their said trust, as the city council may from time to time ordain and establish, not inconsistent with the provisions of law. They shall serve for the period of three years from the time of their appointment, unless the construction of the works herein contemplated shall be sooner finished. Thereafter the rights, powers and
32 authority granted to the said city by this act shall be vested in and exercised by a board of water commissioners, consisting of three citizens of said city, who shall be chosen by the city council, by joint ballot of both branches, one for the term of one year from the first Monday of January in the year eighteen hundred and eighty-one, one for the term of two years, one for the term of three years, and annually thereafter one water commissioner shall be chosen to serve for the term of three years. Said commissioner shall receive such compensation as the city council of said city may prescribe, and a majority of said commissioners shall be a quorum for the exercise of the powers and duties prescribed by this act.

SECT. 12. The said water commissioners shall establish such prices or rents for the use of the water as to provide annually, if practicable, from the net income and receipts therefor, for the payment of the interest on said water bonds, and also, after three years from the introduction of the water into said city, for the further payment of not less than one per centum of the principal of said bonds. The net surplus income and receipts, after deducting all expenses, interest and charges of distribution, shall be set apart as a sinking fund, and applied solely to the payment of the principal of said bonds, until the same are fully paid and discharged. The "commissioners of sinking fund," as now establishad by ordinance of said city, shall be trustees of said fund, and shall annually, and as often as the city council may require, render an account of all their doings in relation thereto.

SECT. 13. The occupant of any tenement shall be liable for the

payment of the rent for the use of the water in such tenement; and the owner thereof shall be also liable if, on being notified of such use, he does not object thereto.

SECT. 14. This act shall take effect upon its passage, and shall become void unless accepted by a vote of two thirds of the legal voters of the city of Newburyport, present and voting thereon, at a legal meeting which shall be called in their several ward rooms for that purpose, by the mayor and aldermen of said city, within one year from the passage of this act, at which meeting the check list shall be used.

Approved May 11, 1878.

33 EXHIBIT C.

Acts and Resolves of Massachusetts, 1879.

Chapter 240.

An act to revive "An act to supply the city of Newburyport with water."

Be it enacted, etc., as follows:

Chapter two hundred and forty of the Acts of the Year Eighteen hundred and seventy-eight, being "An act to supply the city of Newburyport with water," is hereby revived and continued for two years from the passage of this act.

Approved April 18, 1879.

EXHIBIT D.

This indenture, made and concluded this seventeenth day of August, A. D. 1880, by and between the Newburyport Water Company, a corporation duly organized under the laws of the Commonwealth of Massachusetts, of the one part, and the City of Newburyport, a municipal corporation existing under the laws of said Commonwealth, of the other part:

Witnesseth, that whereas said water company, the party of the first part, proposes to construct works and lay pipes for the introduction of water into said city (the party of the second part) for fire and other purposes; and whereas the party of the second part is desirous that its citizens should have the best possible protection against fire.

Now, know all men by these presents, that said water company, the party of the first part, agrees with said city, the party of the second part, as follows, namely:

First. That it will furnish said city water as hereinafter provided, unless sooner terminated by the purchase of its property by said

party of the second part in accordance with section 11 of chapter 235 of the Acts of 1880.

Second. That it will lay and maintain a system of pipes in said Newburyport, substantially in accordance with the plan marked "A, 1880," deposited in the city hall in said Newburyport; that the source of supply and size and quality of the pipes to be used shall be approved by the board of water commissioners of said city, as provided in said act; that it will furnish and set one hundred and twenty-five double-nozzle fire hydrants at points indicated on said plan, and at any time or times, on request of the city council of Newburyport, will furnish and set additional hydrants at points indicated by said party of the second part, at the expense of said party of the first part, provided that the whole number of hydrants shall not exceed one hundred and fifty; that it will at all times maintain a head of water not less than one hundred and twenty-five feet above tide water, and will furnish and maintain a full supply of water for fire purposes during the existence of this contract.

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And in consideration of the above, the party of the second part agrees to pay therefor to the party of the first part the sum of six thousand dollars in each and every year during the existence of this contract, payable in half-yearly payments in January and July. And it is agreed that said term of twenty years shall begin at such time as said company shall have so far completed its works as to be able to comply with the terms of this contract and shall notify said city that it is ready to furnish said water, and that said date shall not be later than the first day of January, A. D. 1882.

And it is further agreed that said company will save the city harmless from all damage arising from the default of said company while constructing said works or in the operation of the same.

Provided, however, that this contract shall be of no force and effect until the same has been assented to by said city by a majority vote of the voters present and voting thereon at a legal meeting called for that purpose, as provided in section eight of the forementioned act.

In witness whereof, the said City of Newburyport, by John James Currier, its mayor, thereto duly authorized, and the Newburyport Water Company, by G. Norman Weaver, its treasurer, thereto duly authorized, have caused these presents to be subscribed in their names and behalf, and the said company has caused the same to be countersigned by Joseph B. Morss, its president, the day and year above written.

G. NORMAN WEAVER, *Treasurer.*
JOSEPH B. MORSS, *President.*
JOHN J. CURRIER,
Mayor of the City of Newburyport.

35 EXHIBIT E.

Acts and Resolves Passed by the General Court of Massachusetts in the Year 1893.

Chapter 471.

An act to supply the city of Newburyport with water.

Be it enacted, etc., as follows:

SECTION 1. The City of Newburyport may supply itself and its inhabitants with water for the extinguishment of fires and for domestic, manufacturing and other purposes, and may establish fountains and hydrants, relocate or discontinue the same; may regulate the use of such water and fix and collect rates to be paid for the use of the same.

SECT. 2. The said city, for the purposes aforesaid, may take, by purchase or otherwise, and hold the waters of any pond, stream, spring or wells within the limits of said city not heretofore taken or purchased by the Newburyport Water Company, and the Artichoke river in West Newbury and Newburyport, and the water rights connected therewith; and obtain and take water by means of bored, driven, artesian or other wells on any lands within said city, and hold and convey said water through said city and through said town of West Newbury from said ponds and said river; and may also take and hold, by purchase or otherwise, all lands, rights of way and easements necessary for holding and preserving such water and for conveying the same to any part of said city of Newburyport; and may erect on the land thus taken or held proper dams, buildings, fixtures and other structures; and may make excavations, procure and operate machinery and provide such other means and appliances as may be necessary for the establishment and maintenance of complete and effective water works; and may construct and lay down conduits, pipes and other works: under or over any lands, water courses, railroads or public or private ways, and along any such way in such manner as not unnecessarily to obstruct the same; and for the purpose of constructing, maintaining and repairing such conduits, pipes and other works, and for all proper purposes of this act, said city may dig up any such lands, and, under the direction of the board of selectmen of the town in which any such ways are
36 situated, may enter upon and dig up any such ways in such manner as to cause the least hindrance to public travel thereon.

SECT. 3. The city shall, within sixty days after the taking of any lands, rights of way, water rights, water sources or easements as aforesaid, otherwise than by purchase, file and cause to be recorded in the registry of deeds, for the county within which the same are situated, a description thereof sufficiently accurate for identification,

with a statement of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for.

SECT. 4. The city shall pay all damages sustained by any person or corporation in property by the taking of any land, right of way, water, water source, water right or easement, or by any other thing done by said city under the authority of this act. Any person or corporation sustaining damages as aforesaid under this act, who fails to agree with said city as to the amount of damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways, on application at any time within the period of three years from the taking of such land or other property, or in the doing of other injury, under the authority of this act, but no such application shall be made after the expiration of said three years. No application for assessment of damages shall be made for the taking of any water, water right, or for any injury thereto, until the water is actually withdrawn or diverted by said city under authority of this act.

SECT. 5. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip, to an amount not exceeding in the aggregate four hundred thousand dollars; such bonds, notes or scrip shall bear on their face the words, "Newburyport water loan;" shall be payable at the expiration of periods not exceeding thirty years from the date of issue; shall bear interest payable semi-annually at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and be countersigned by the water commissioners hereinafter provided for. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper, *pro-*
37 *vided*, that such securities shall not be sold for less than par value thereof. The city shall provide, at the time of contracting said loan, for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of said loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan and shall be used for no other purpose.

SECT. 6. The said city instead of establishing a sinking fund may, at the time of authorizing said loan, provide for the payment thereof in such annual proportionate payments as will extinguish the same within the time prescribed in this act; and when such vote has been passed the amount required thereby shall, without further vote, be assessed by the assessors of said city in each year thereafter, until the debt incurred by said loan shall be extinguished in the same manner as other taxes are assessed, under the provisions of section thirty-four of chapter eleven of the public statutes.

SECT. 7. The return required by section ninety-one of chapter eleven of the public statutes shall state the amount of any sinking fund established under this act, and if none is established, whether action has been taken in accordance with the provisions of the pre-

ceding section, and the amounts raised and applied thereunder for the current year.

SECT. 8. The said city shall raise annually by taxation a sum which, with the income derived from the water rates, will be sufficient to pay the current annual expenses of operating its water works, and the interest as it accrues on the bonds, notes and scrip issued as aforesaid by said city, and to make such contributions to the sinking fund and payments on the principal as may be required under the provisions of this act.

SECT. 9. Whoever wilfully or wantonly corrupts, pollutes or diverts any of the waters taken or held under this act, or injures any structure, work or other property owned, held or used by said city under the authority and for the purposes of this act, shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort; and upon conviction of either of the above wilful or wanton acts shall be pun-
38 ished by a fine not exceeding three hundred dollars, or by imprisonment not exceeding one year.

SECT. 10. The powers and duties granted to and imposed upon the City of Newburyport by this act shall be exercised by a board of water commissioners, consisting of five residents of the city, to be appointed by the mayor with the approval of the city council. Said commissioners shall be appointed and hold their office from the time of their appointment and approval, for the terms of one, two, three, four and five years, respectively, from the first Monday of May next following their appointment; and thereafter one commissioner shall be appointed each year for the term of five years from the first Monday in May. All such commissioners, except in a case of removal, shall hold office until their successors are appointed in their stead. Vacancies occurring during the term may be filled for the remainder of the term. No person shall be appointed commissioner who holds, at the time, any city office by popular election. Any commissioner, after due notice and hearing, may be removed at any time by a two-thirds vote of each branch of the city council, for any cause which shall be deemed sufficient, and shall be expressed in the vote of removal. The commissioners shall receive no compensation for their services unless the city council by a two-thirds vote of each branch thereof otherwise determine, and in such case the amount of compensation may be fixed by a like two-thirds vote.

SECT. 11. The water commissioners shall fix such prices or rents for the use of water as shall produce annually, as near as may be, a net surplus equal to two per centum of the total amount of the bonds, notes and scrip issued under this act, after paying all current expenses of operating the water works and interest upon loans, and after the payment of all expenses for new construction not exceeding ten thousand dollars in any one year. The commissioners of sinking funds of the city of Newburyport shall be trustees of a sinking fund which shall be set apart for the payment and redemption of said water loan, and which shall remain inviolate and

pledged to the payment of said loan and shall be used for no other purpose. The net surplus aforesaid shall be paid into the sinking fund, and if said surplus does not equal two per centum of the total amount of the bonds, notes and scrip issued under this act, the city shall raise by general taxation a sum which with the surplus shall equal said two per centum, and shall contribute said sum to the sinking fund. The commissioners shall annually, and as often as the city council may require, render an account of all their doings in relation to the sinking fund, and shall be governed by the provisions of section eleven of chapter twenty-nine of the Public Statutes, except as herein otherwise provided.

SECT. 12. At any time within sixty days after the passage of this act, and not after sixty, the Newburyport Water Company may notify the mayor of Newburyport in writing that it desires to sell to said city its corporate property and all the rights and privileges of said company, and execute and deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid; *provided, however*, the legal voters of the city of Newburyport, at legal meetings to be called in the several wards of said city within six months after said notification has been received as aforesaid, shall, by a majority vote of the voters of said city present and voting thereon at such meetings, vote to purchase the aforesaid property upon the terms and conditions contained in this section, whereupon the property thus conveyed shall become the property of the City of Newburyport, and said city shall be liable to pay to said company the fair value of the property thus conveyed; and in case the said city and the said company shall be unable to agree upon the value of said property, the supreme judicial court may, upon application of either party and notice to the other, appoint three commissioners, one of whom shall be a skilled engineer, and one learned in the law, who shall determine the fair value of said property conveyed as aforesaid, and whose award when accepted by the court shall be final.

SECT. 13. After the vote provided for in section twelve of this act, or provided the Newburyport Water Company does not so notify the said mayor within said sixty days, this act shall be submitted to the legal voters of the city of Newburyport for their acceptance or rejection, at legal meetings to be called in the several wards of said city within eight months from the passage of this act, and shall take effect from and after its acceptance by a two-thirds vote of the voters of said city present and voting thereon at such meetings. The vote shall be by separate ballot, and the ballot shall be Yes, or No, in answer to the question, "Shall the City of Newburyport accept chapter — of the Acts of eighteen hundred and ninety-three, authorizing the City of Newburyport to establish and maintain a system of water supply for domestic and other uses?" This act shall be void if not accepted by said vote.

Approved June 10, 1893.

Exhibit F.

To the honorable senate and house of representatives of the Commonwealth of Massachusetts, in general court assembled:

The undersigned petitioner, The Newburyport Water Company, respectfully represents:

That it is a corporation duly established by virtue of the provisions of chapter 235 of the Acts of the year 1880; that the City of Newburyport has voted to accept the provisions of chapter 471 of the Acts of the year 1893, and, by virtue of the authority conferred upon it by said act, to establish independent works to supply water to itself and its inhabitants, and not to purchase the property and privileges of your petitioner as it was authorized to do by said act. And your petitioner says that if said city proceeds to establish such independent supply, the property and franchise of your petitioner will be greatly injured in value and may be rendered substantially worthless; and that your petitioner's plant and property was obtained for the express purpose of furnishing such supply of water, and is well adapted and has been thus far used therefor.

And your petitioner further represents that there is doubt whether the provisions of chapter 471 of the Acts of the year 1893 are adequate to enable your petitioner to obtain compensation for the injury which may be done to your petitioner by said city.

Wherefore your petitioner prays for the passage of an act providing and requiring that said city shall, before proceeding to supply water to itself or its inhabitants under the authority of said chapter 471, purchase the franchise, property and all the rights and privileges of your petitioner, and that your petitioner be author-
41 ized to make sale thereof; or that in some other suitable way your petitioner may be compensated for said threatened damage by said city.

THE NEWBURYPORT WATER COMPANY,
By JOHN E. McCUSKER, *Sup't.*

Exhibit G.

An act to provide for the purchase of the property of the Newburyport Water Company by the City of Newburyport.

Be it enacted, etc., as follows:

Section 1. The City of Newburyport shall, before proceeding to supply water to itself or its inhabitants under the authority of chaptor four hundred and seventy-one of the Acts of the year one thousand eight hundred and ninety-three, purchase from the Newburyport Water Company the franchise, corporate property and all the rights and privileges of said Newburyport Water Company, and

said Newburyport Water Company is authorized to make sale of the same to said city. The compensation to be paid by said city to said company shall be determined by three commissioners to be appointed by the supreme judicial court, upon application of either party and notice to the other, whose award, when accepted by said court, shall be binding upon all parties.

SECT. 2. Upon petition by said Newburyport Water Company, the supreme judicial court shall have jurisdiction in equity, if said city shall proceed to supply itself or its inhabitants with water before making the purchase aforesaid, to enjoin said city from so doing until it shall have made said purchase, and to compel it to make said purchase.

EXHIBIT H.

Acts and Resolves Passed by the General Court of Massachusetts for the Year 1894.

Chapter 474.

An act to provide for the purchase of the property of the Newburyport Water Company by the City of Newburyport.

Be it enacted, etc., as follows:

SECTION 1. If, within thirty days after the passage of this act, the Newburyport Water Company shall notify the mayor of the
42 city of Newburyport, in writing, that it desires to sell to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants under the authority of chapter four hundred and seventy-one of the Acts of the year eighteen hundred and ninety-three, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same. Whenever said city shall, by a majority vote of the legal voters of said city present and voting thereon at a meeting called for that purpose, vote to purchase said property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said company shall, within twenty days after the vote aforesaid, execute and deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid, and said property thus conveyed shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided. If at the first meeting a majority of the voters present and voting do not vote to purchase said property, other meetings may be called and held therefor. In case the said city and the said company shall be una-

ble to agree upon the value of said property, the supreme judicial court shall, upon application of either party and notice to the other, appoint three commissioners, two of whom shall be skilled engineers and the third learned in the law, who shall determine the fair value of said property for the purposes of its use by said city, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company.

SECT. 2. In case said Newburyport Water Company shall convey its property to the City of Newburyport, in accordance with the provisions of the preceding section, said city shall manage and use the property thus conveyed for the purposes and under the pro-
43 visions of chapter four hundred and seventy-one of the Acts of the year eighteen hundred and ninety-three.

SECT. 3. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip to an amount sufficient for such purpose; such bonds, notes or scrip shall bear on their face the words, "Newburyport water loan," shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest payable semi-annually at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and countersigned by the water commissioners provided for by chapter four hundred and seventy-one of the Acts of the year eighteen hundred and ninety-three. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper, provided that such securities shall not be sold for less than the par value thereof. The city shall provide at the time of contracting said loan for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of such loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan, and shall be used for no other purpose.

SECT. 4. In case said city shall, in violation of section one of this act, proceed to supply itself or its inhabitants with water before making the purchase aforesaid, the supreme judicial court shall, upon petition of said company, have jurisdiction in equity to enjoin said city from so doing until it shall have made such purchase.

SECT. 5. This act shall take effect upon its passage.

Approved June 14, 1894.

EXHIBIT I.

JULY 10, 1894.

Hon. Orrin J. Gurney, mayor of the city of Newburyport.

SIR: The Newburyport Water Company hereby notifies you that it desires to sell to the City of Newburyport all the
44 rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company, and used in supplying said city and the inhabitants thereof with water.

This notice is given in accordance with the provisions of section one of chapter four hundred and seventy four of the Acts of the Legislature of Massachusetts for the year eighteen hundred and ninety-four, and a copy of the vote of the company under which I am authorized to give said notice is hereto annexed.

Very respectfully, JOHN E. McCUSKER,
Clerk Newburyport Water Company.

At a meeting of the Newburyport Water Company duly called for the purpose of considering that question, and notified as provided in article 5 of the by-laws, and held at Fraternity hall, Newburyport, Mass., on Tuesday, the tenth day of July, A. D. 1894, at ten o'clock in the forenoon, the following vote was passed:

Voted, That this company desires to sell to the City of Newburyport, Mass., all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, and John E. McCusker, the clerk of the company, is hereby authorized and directed to notify the mayor of said city within thirty days from the fourteenth day of June, 1894, in writing that the company so desires, agreeably to the provisions of chapter 474 of the Acts of the Legislature of Massachusetts for the Year 1894, and the president and treasurer of said company are hereby authorized and directed, in case said city shall vote to purchase said property as provided by said act, to execute and deliver to said city, within twenty days after said vote of said city, proper deeds and instruments in writing, conveying to said city the property aforesaid.

JOHN E. McCUSKER, *Clerk.*

45 EXHIBIT J.

Know all men by these presents, that whereas the Newburyport Water Company, a corporation duly organized under the laws of this Commonwealth, and having its place of business in the City of

Newburyport, in the county of Essex, in said Commonwealth, has heretofore, in accordance with chapter 474 of the Acts of the Legislature of Massachusetts for the Year 1894, entitled "An act to provide for the purchase of the property of the Newburyport Water Company by the City of Newburyport," duly notified the mayor of said City of Newburyport in writing that it desired to sell to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water; and whereas said city, in accordance with said act, voted to purchase said property of said company;

Now, therefore, said Newburyport Water Company, in compliance with said act and in consideration of the compensation provided for by said act to be paid to it by said City of Newburyport, hereby doth grant, remise, release, and forever quit-claim unto the said City of Newburyport all said property, a description whereof follows, namely:

1. All the waters of the brook running from Bartlett springs, so called to the Merrimac river and through the two following described parcels of land, and all the waters within or upon said land, and all the waters that may or can be obtained therein or can be used or conveyed therefrom. Said land is bounded and described as follows: two parcels of real estate or land situate in said Newburyport near Bartlett springs, so called. The first parcel of land or real estate is bounded and described as follows: Beginning at a point on the southerly side of Spring lane and the southerly end of a culvert through which the brook runs which discharges the water from the Bartlett springs, thence following the southerly and westerly side of said Spring lane south $31\frac{3}{4}°$ east $57\frac{6}{10}$ feet, thence south 18° east 97 feet, thence south $15\frac{1}{2}$ east $92\frac{7}{10}$ feet, thence south 9° east 68 feet, thence south 9° west $19\frac{5}{10}$ feet, thence south 46 62° west 36 feet to a stake on the westerly line of Spring lane and 18 feet from a branch of said brook, thence north 69° west 135 feet to a large poplar tree, thence north 62° west 243 feet to an apple tree, thence north 42° west $303\frac{5}{10}$ feet to a stake by the fence between said land and land of L. & E. L. Bartlett, thence by said fence and Bartlett's land north $43\frac{1}{2}°$ east 208 feet to a stake by said fence 100 feet beyond the brook, thence south 50° east $248\frac{4}{10}$ feet, thence south 58° west 50 feet to a large willow tree on the southerly side of Spring lane, thence by the southerly side of Spring lane to the point of beginning, containing $3\frac{3}{4}$ acres. The second parcel of land or real estate is bounded and described as follows: Beginning at the northerly side of Spring lane and the northerly end of the culvert named in the foregoing description, and thence by the northerly side of said Spring lane 198 feet to a willow tree, thence turning at a right angle and running to the Merrimac river to low water mark about 150 feet, thence by said river to the brook first mentioned, thence by said brook to the point of beginning, containing $\frac{3}{4}$ of an acre more or less. Said parcels of land or real estate

and said waters having been taken by said company in the exercise of the right of eminent domain from John L. Moulton.

2. The parcels of land described in the preceding paragraph. Also the following property, whether included in said land or not: (1) The pumping station, consisting of a brick building and coal shed connected therewith upon the lot of land first described in item one herein; (2) the pumps, engines and all appliances, fixtures, fittings and appurtenances contained in said pumping station building, including three boilers (two of which are in use), with the foundations, settings, connections, fittings and fixtures thereof in said pumping station building; (3) four wells with suction pipes, foot-valves and driven pipes within or connected therewith upon the land first described in item one herein; (4) the dam, gates and appliances connected therewith situate upon the land first described in item one herein; (5) the pond upon land first described in item one herein; (6) four filters, with all gates, pipes, appliances and appurtenances connected therewith or belonging thereto, situate upon the second lot of land described in item one herein; (7) a clear water wall, with suction pipe, foot-valves, and appur-
47 tenances on the second lot of land described in item one herein; (8) all suction pipes, gates, fittings, appliances, and appurtenances other than those hereinbefore described, situate upon both said lots of land described in item one herein.

3. A certain parcel of land, with a tenement house and barn thereon, situate on said Spring lane, bounded and described as follows: Northerly by the public landing and the Merrimac river; westerly by the road leading to Bartlett's avenue, known as Spring lane; easterly and southerly by land described in item four herein.

4. A certain parcel of land situate on said Spring lane, bounded by said lane, by land now or late of Henry Jackman, by land now or late of the heirs of David Jackman, by the Merrimac river, and by land described in item three herein.

5. A certain parcel of land situate in that part of Newburyport known as Belleville, containing $58\frac{45}{100}$ square rods, described as follows: Beginning at a post at the northerly corner of said parcel and at the northwesterly corner of land now or late of William M. Hopkinson, and a two-rod lane adjoining said land of Hopkinson and leading to High street, said post being 247½ feet south, 74½° west from the line of said High street, thence south 28½° east 178½ feet by land of said Hopkinson and land now or late of James M. Morse to land now or late of the city of Newburyport, thence by said land of said city south 77½° west 100 feet to a stake and stones, thence north 28½° west by land now or late of Hale 153 feet to a stake and stones at the extension of said two-rod lane, thence north 62° east 96 feet to the point of beginning, together with a right of way over said lane and extension, and the right to dig up the same and lay pipes thereunder, the owner of said land being bound to build and maintain all fences. Including the standpipe and its foundations, with all gates, valves, fixtures, appliances and appur-

tenances used or connected therewith, situate upon land described in item five herein.

6. The right to lay and maintain pipes in and through a certain strip or parcel of land in said Newburyport, being a part of a certain field situate upon the southwest side of High street, in that part of said Newburyport which is known as Belleville. Said strip being twelve feet in width, and beginning at the gate on High
48 street, thence continuing through the centre of the field to the land of said Newburyport Water Company described in item five herein, with the right to enter at any time upon said strip for the purpose of laying, relaying or repairing said pipe, or doing any acts necessary and proper for the maintenance of said pipes, reference being had to a grant from Charles H. Ireland *et al.* to said company, dated April 21, 1881, recorded with Essex Deeds, South District, Book 1057, leaf 12.

7. The right to lay and maintain pipes in and through a certain strip of land owned on Sept. 4, 1891, by Philip D. Adams, and situate near the electric power station in said Newburyport, said strip being at said date open and used as a way by one Allen and others; subject to the obligation of the grantee to keep said way in good and passable condition at all times, and to hold said Adams harmless from any damage or injury which may result from bursting, settling or other casualty in connection with said pipes; the same having been conveyed by said Adams to said company on said date, by a paper writing now at the office of said company, number two Bartlett street, in said Newburyport.

8. The dam, building, engine, boiler, feed-pump, well, suction pipe, and any and all fixtures and appliances connected with said dam, building, engine, boiler, pump, well or pipe situate upon land of Henry M. Jackman, about fifteen hundred feet southeasterly of said pumping station building; also about fifteen hundred feet wrought iron five-inch pipe, extending from said building to said pumping station building, and all gates, check-valves, appliances and fixtures connected with said pump.

9. The twelve-inch cast-iron force-main pipe, about 7976 feet in length, extending from said main pumping station building through Spring lane, Ferry road, High street, and thence across land described in item six herein to the stand-pipe situated upon land described in item five herein, with all gates, branches, fixtures, appliances and appurtenances connected with said force-main pipe or in use therewith; three hundred and seventy-six feet of said force-main pipe, namely, that portion thereof extending from said stand-pipe to said High street, being also used as a leading main.

10. All distribution pipes and all gates, connections, appli-
49 ances and appurtenances connected therewith, laid and maintained in the streets of said Newburyport, and used by said company for the supply of water, as follows: (The lengths may vary slightly from the figures given.)

(1.) Ten thousand feet of twelve-inch cast-iron distribution pipe,

laid from the gate near said stand-pipe, through High and State streets to Market square.

(2.) Eighteen hundred and eighty-one feet of eight-inch cast-iron pipe, laid in High street between State and Lime streets.

(3.) Twenty-nine hundred and sixty-eight feet of eight-inch cast-iron pipe, laid in Merrimac street, between Market square and Kent street.

(4.) Seventy-six hundred and thirty feet of eight-inch wrought-iron, cement-lined pipe, laid in Merrimac street, from building known as Bayley hat shop to Chain bridge, and from junction of Merrimac and Spofford streets through Spofford street to Ferry road, or High street.

(5.) Three hundred and forty feet of eight-inch wrought-iron cement-lined pipe, laid in Union street, from Goodwin's avenue to the gas house.

(6.) Fifteen hundred and ninety-three feet of six-inch cast-iron pipe, laid in Ashland street, between High and Merrimac streets.

(7.) Thirteen hundred and forty-three feet of six-inch cast-iron pipe, laid in Boardman street, between High and Merrimac streets.

(8.) Sixteen hundred and twenty-five feet of six-inch cast-iron pipe, laid in Broad street, between High and Merrimac streets.

(9.) Two thousand and fifty-two feet of six-inch cast-iron pipe, laid in Bromfield street, between High and Merrimac streets.

(10.) Two thousand and ninety three feet of six-inch cast-iron pipe, laid in Federal street, between High and Merrimac streets.

(11.) One thousand four hundred and six feet of six-inch cast-iron pipe, laid in Green street, between High and Merrimac streets.

(12.) One thousand seven hundred and eighteen feet of six-inch cast-iron pipe, laid in Kent street, between High and Merrimac streets.

(13.) Two thousand one hundred and twenty-five feet of six-inch cast-iron pipe, laid in Lime street, between High and Merrimac streets.

50 (14.) One thousand one hundred and eighty-seven feet of six-inch cast-iron pipe, laid in Market street, between High and Merrimac streets.

(15.) Sixteen hundred and twenty-five feet of six-inch cast-iron pipe, laid in Oakland street, between High and Merrimac streets.

(16.) Twelve hundred and eighteen feet of six-inch cast-iron pipe, laid in Winter street, between High and Merrimac streets.

(17.) Ten hundred and sixty-two feet of six-inch cast-iron pipe, laid in Pleasant street, between State and Titcomb streets.

(18.) Fifteen hundred and thirty-one feet of six-inch cast-iron pipe, laid in Fair street, between Prospect and Water streets.

(19.) Six hundred and twenty-five feet of six-inch cast-iron pipe, laid in Fruit street, between High and Prospect streets.

(20.) Six hundred and ninety-seven feet of six-inch cast-iron pipe, laid in Harris street, between Green and State streets.

(21.) Sixteen hundred and thirty-two feet of six-inch cast-iron pipe, laid in High street, between Lime and Marlboro streets.

(22.) Thirteen hundred and twelve feet of six-inch cast-iron pipe, laid in Liberty street, between State and Federal streets.

(23.) Forty-two hundred and twenty-seven feet of six-inch cast-iron pipe, laid in Merrimac street, between Kent street and hat factory building.

(24.) Fifteen hundred and ninety-three feet of six-inch cast-iron pipe, laid in Monroe street, between Kent and Oakland streets.

(25.) Twenty-six hundred and eighty-seven feet of six-inch cast-iron pipe, laid in Prospect street, between State and Bromfield streets.

(26.) Twenty-six hundred and twenty-five feet of six-inch cast-iron pipe, laid in Washington street, between Green and Kent streets.

(27.) Twenty-two hundred and ninety-three feet of six-inch cast-iron pipe, laid in Water street, between Market square and Lime street.

(28.) Seven hundred and fifty feet of six-inch cast-iron pipe, laid in Purchase street between Lime and Bromfield streets.

(29.) Four hundred and fifty feet of six-inch cast-iron pipe, laid on Ferry wharf, from Market square to the coal pocket.

51 (30.) Two hundred and fifty feet of six-inch wrought-iron cement-lined pipe, laid in Auburn street, between High and Vernon streets.

(31.) Fifteen hundred and ninety-three feet of six-inch wrought-iron cement-lined pipe, laid in Forrester street, between High and Merrimac streets.

(32.) Twenty-three hundred and twelve feet of six-inch wrought iron cement-lined pipe, laid in Marlboro street, between High and Water streets.

(33.) Five hundred and thirty-one feet of six-inch wrought-iron cement-lined pipe, laid in Greenleaf street, between State and Dalton streets.

(34.) Thirteen hundred and twelve feet of six-inch wrought-iron cement-lined pipe, laid in Middle street, between State and Federal streets.

(35.) Ten hundred and sixty-two feet of six-inch wrought-iron cement-lined pipe, laid in Purchase street, between Marlboro and Lunt streets.

(36.) One hundred and fifty-six feet of six-inch wrought-iron cement-lined pipe, laid in Vernon street, commencing at Auburn street.

(37.) Twenty-five hundred and thirty-one feet of six-inch wrought-iron cement-lined pipe, laid in Water street, between Marlboro and Lime streets.

(38.) Seven hundred feet of six-inch wrought-iron cement-lined pipe, laid in Union street, between Marlboro street and Goodwin avenue.

(39.) Eleven hundred and forty feet of six-inch wrought-iron cement-lined pipe, laid in Hancock street, between Bromfield and Marlboro streets.

(40.) Twenty-two hundred and fifty feet of six-inch wrought-iron

cement-lined pipe, laid in Toppan street, between High and Low streets.

(41.) Eighteen hundred feet of six-inch wrought-iron cement-lined pipe, laid in North Atkinson street, between High street and almshouse.

(42.) Twenty-five hundred and forty-seven feet of six-inch
52 wrought-iron cement-lined pipe laid in State street, between High and Parker streets.

(43.) Seven hundred and eighty-one feet of four inch cast-iron pipe, laid in Beck street, between High and Washington streets.

(44.) One hundred and eighty-one feet of six-inch wrought-iron cement-lined pipe, laid in Inn street, between Pleasant street and just above Bartlett's.

(45.) Seven hundred and twenty-eight feet of four-inch cast-iron pipe, laid in Beck street, between Federal and Lime streets.

(46.) Sixteen hundred and twenty-five feet of four-inch cast iron pipe, laid in Carter street, between High and Merrimac streets.

(47.) Seven hundred and eighteen feet of four-inch cast-iron pipe, laid in Congress street, between Olive and Kent streets.

(48.) Four hundred and sixty-eight feet of four-inch cast-iron pipe, laid in Court street, between High and Washington streets.

(49.) Eight hundred and forty-three feet of four-inch cast-iron pipe, laid in Dove street, between Munroe and Merrimac streets.

(50.) Four hundred and sixty-eight feet of four-inch cast-iron pipe, laid in Dalton street, between Greenleaf and Hill streets.

(51.) Six hundred and fifty-six feet of four-inch cast-iron pipe, laid in Essex street, between State and Fair streets.

(52.) Three hundred and seventy-five feet of four-inch cast-iron pipe, laid in Greenleaf street, between Pond and Dalton streets.

(53.) Three hundred and forty-three feet of four-inch cast-iron pipe, laid in Hale's court, between Pleasant street and Prince place.

(54.) One hundred and seventy-eight feet of four-inch cast-iron pipe, laid in Milk street, between Lime street and a point opposite Bayley's greenhouse.

(55.) Fourteen hundred and thirty-seven feet of four-inch cast-iron pipe, laid in Olive street, between High and Merrimac streets.

(56.) Seven hundred and fifty feet of four-inch cast-iron pipe, laid in Pond street, between High and Greenleaf streets.

(57.) Four hundred and six feet of four-inch cast-iron pipe, laid in Prince's place, between State street and Hale's court.

(58.) Three hundred and seventy-five feet of four-inch cast-iron pipe, laid in Purchase street, between Bromfield and Lunt streets.

53 (59.) Three hundred and twelve feet of four-inch cast-iron pipe, laid in School street, from Federal street to the schoolhouse.

(60.) Seven hundred and eighty-one feet of four-inch cast-iron pipe, laid in Strong street, between Washington and Merrimac streets.

(61.) Eleven hundred and eighty-seven feet of four-inch cast-iron pipe, laid in Summer street, between High and Merrimac streets.

(62.) Six hundred and fifty-seven feet of four-inch cast-iron pipe, laid in Temple street, between State and Fair streets.

(63.) Sixteen hundred and fifty-six feet of four-inch cast-iron pipe, laid in Tyng street, between High and Merrimac streets.

(64.) Eight hundred and twelve feet of four-inch cast-iron pipe, laid in Warren street, between Munroe and Merrimac streets.

(65.) Fifteen hundred and ninety-three feet of four-inch cast-iron pipe, laid in Woodland street, between High and Merrimac streets.

(66.) Three hundred and ninety feet of four-inch cast-iron pipe, laid in Inn street, from Market square to just above Bartlett street.

(67.) Six hundred and fifty-six feet of four-inch wrought-iron cement-lined pipe, laid in Allen street, between High and Prospect streets.

(68.) Six hundred and twenty-five feet of four-inch wrought-iron cement-lined pipe, laid in Atwood street, between Federal and Lime streets.

(69.) Eight hundred and twelve feet of four-inch wrought-iron cement-lined pipe, laid in Charles street, between Purchase and Water streets.

(70.) Six hundred and fifty-six feet of four-inch wrought-iron cement-lined pipe, laid in Charter street, between State and Fair streets.

(71.) Seven hundred and eighty-one feet of four-inch wrought-iron cement-lined pipe, laid in Franklin street, between Purchase and Water streets.

(72.) Seven hundred and eighteen feet of four-inch wrought-
54 iron cement-lined pipe, laid in Harrison street, between Purchase and Water streets.

(73.) Three hundred and seventy-five feet of four-inch wrought-iron cement-lined pipe, laid in Lunt street, between Purchase and Hancock streets.

(74.) Seven hundred and eighty-one feet of four-inch wrought-iron cement-lined pipe, laid in Merrill street, between Congress and Merrimac streets.

(75.) Twelve hundred and fifty feet of four-inch wrought-iron cement-lined pipe, laid in Milk street, from Bromfield street to a point opposite Bayley's greenhouse.

(76.) Six hundred and twenty-five feet of four-inch wrought-iron cement-lined pipe, laid in Orange street, between Fair and Federal streets.

(77.) Four hundred and sixty-eight feet of four-inch wrought-iron cement-lined pipe, laid in Park street, between High and Harris streets.

(78.) Six hundred and fifty-six feet of four-inch wrought-iron cement-lined pipe, laid in Parsons street, between high and Prospect streets.

(79.) Seven hundred and eighty-one feet of four-inch wrought-iron cement-lined pipe, laid in Salem street, between Purchase and Water streets.

(80.) Three hundred and forty-three feet of four-inch wrought-iron

cement-lined pipe, laid in School street, from point opposite schoolhouse to Lime street.

(81.) Six hundred and twenty-five feet of four-inch wrought-iron cement-lined pipe, laid in Spring street, between Fair and Federal streets.

(82.) Five hundred and ninety-three feet of four-inch wrought-iron cement-lined pipe, laid in Temple street, between Fair and Federal streets.

(83.) Two hundred and thirty-seven feet of two-inch wrought-iron cement-lined pipe, laid in Atkinson street, between Boardman and Strong streets.

(84.) Three hundred and twelve feet of two-inch wrought-
55 iron cement-lined pipe, laid in Pleasant street, between Titcomb and Market streets.

(85.) Three hundred and forty-four feet of two-inch wrought-iron cement-lined pipe, laid in Garden street, between State and Otis streets.

(86.) Two hundred and sixty feet of two-inch wrought-iron cement-lined pipe, laid in Hill street, between Pond and Dalton streets.

(87.) Seven hundred and fifty feet of two-inch wrought-iron cement-lined pipe, laid in Jefferson street, between Oakland and Woodland streets.

(88.) Five hundred and seventy-seven feet of two-inch wrought-iron cement-lined pipe, laid in Ship street, between Water and Beck streets.

(89.) Five hundred and thirty-seven feet of two-inch wrought-iron cement-lined pipe, laid in Willow avenue, between High and Maple streets.

(90.) Two hundred and forty-five feet of two-inch wrought-iron cement-lined pipe, laid on Lunt's wharf, commencing at Merrimac street.

(91.) Two hundred and forty feet of two-inch wrought-iron cement-lined pipe, laid in Ocean street, between Carter and Warren streets.

(92.) Nine hundred and fifty-six feet of two-inch wrought-iron cement-lined pipe, laid in Union street, from Marlboro street to a point opposite gas house.

(93.) Two hundred and thirty-six feet of two-inch wrought-iron cement-lined pipe, laid in Elbow lane, between Water and Centre streets.

(94.) Seven hundred and fifty feet of two-inch wrought-iron cement-lined pipe, laid in Walnut street, between Woodland and Oakland streets.

(95.) One hundred and twenty feet of two-inch wrought-iron cement-lined pipe, laid in Franklin street, between Purchase and Milk streets.

(96.) Seven hundred and two feet of two-inch wrought-iron
56 cement-lined pipe, laid in Magnolia street, between Chapel and Woodland streets.

(97.) Eight hundred and fifty-two feet of two-inch wrought-iron cement-lined pipe, laid in Chapel street, between High and Howard streets.

(98.) Two hundred and thirty feet of two-inch wrought-iron cement-lined pipe, laid in Maple street, between Forrester and Chapel streets.

(99.) Three hundred and thirty feet of two-inch wrought-iron cement-lined pipe, laid in Dexter street, between Woodland and Beacon streets.

(100.) Eight hundred and eighty-eight feet of two-inch wrought-iron cement-lined pipe, laid in Summit street, commencing at High street.

(101.) One hundred and fifty-five feet of two-inch wrought-iron cement-lined pipe, laid in Dexter street, between Woodland and Beacon streets.

(102.) One hundred and thirty feet of two-inch wrought-iron cement-lined pipe, laid in Beacon street, between Dexter and Payson streets.

(103.) Three hundred feet of two-inch wrought-iron cement-lined pipe, laid in Jefferson street, commencing at Merrimac street.

(104.) One hundred and fifteen feet of two-inch wrought-iron cement-lined pipe, laid in Centre street, commencing at Liberty street.

(105.) Two hundred and eighty-five feet of two-inch wrought-iron cement-lined pipe, laid in Bromfield court, commencing at Bromfield street.

(106.) Seven hundred and thirty feet of two-inch wrought-iron cement-lined pipe, laid in Oak street, commencing at Marlboro street.

(107.) Three hundred and thirty feet of two-inch wrought-iron cement-lined pipe, laid in Neptune street, commencing at Purchase street.

(108.) Eight hundred and twenty-five feet of two-inch wrought iron cement-lined pipe, laid in Arlington street, commencing at High street.

57 (109.) Four hundred and fifty-five feet of two-inch wrought-iron cement-lined pipe, laid in South Pond street, commencing at Marlboro street.

(110.) Three hundred feet of two-inch wrought-iron cement-lined pipe, laid in Pine street, commencing at Marlboro street.

(111.) Fifteen hundred and fifty feet of two-inch wrought-iron cement-lined pipe, laid in High street, between Marlboro street and Old Town green.

(112.) Four hundred and forty feet of two-inch wrought-iron cement-lined pipe, laid on Water street, commencing at Marlboro street.

(113.) One hundred and eighty-five feet of two-inch wrought-iron cement-lined pipe, laid in Caldwell's court, commencing at Merrimac street.

(114.) Three hundred and sixty-five feet of two-inch wrought-

iron cement-lined pipe, laid in Johnson street, commencing at High street.

(115.) Eight hundred and fifty feet of two-inch of wrought-iron cement-lined pipe, laid in Barton street, between High and Chestnut streets.

(116.) One hundred and eighty-two feet of two-inch wrought-iron cement-lined pipe, laid in Bartlett street, between Inn street and water office.

(117.) Ninety-five feet of two-inch wrought-iron cement-lined pipe, laid in Threadneedle alley, commencing at Inn street.

(118.) One hundred feet of the one and one-half inch wrought-iron cement-lined pipe, laid in Allen street, commencing at Prospect street.

(119.) Eighty-six feet of one and one-half inch wrought-iron cement-lined pipe, laid in Bartlett street, commencing at the water office.

(120.) Three hundreed and thirty-three feet of one and one-half inch wrought-iron cement-lined pipe, laid in Beck street, between Federal and Ship streets.

(121.) Ten hundred and sixty feet of one and one-half inch wrought-iron cement-lined pipe, laid in Chestnut street, between Bromfield and Marlboro streets.

58 (122.) Seven hundred and sixty feet of one and one-half inch wrought-iron cement-lined pipe, laid in Eagle street, between Kent and Carter streets.

(123.) Three hundred and eighty-five feet of one and one-half inch wrought-iron cement-lined pipe, laid in Elm street, between Merrimac and Plum streets.

(124.) One hundred and seventy feet of one and one-half inch wrought-iron cement-lined pipe, laid in Goodwin street, commencing at Union street.

(125.) Five hundred and thirty feet of one and one-half inch wrought-iron cement-lined pipe, laid in Howard street, between Woodland street and Butler's court.

(126.) Three hundred and eighty-one feet of one and one half inch wrought-iron cement-lined pipe, laid in Inn street, between Market square and *Herald* building.

(127.) Three hundred and six feet of one and one-half inch wrought-iron cement-lined pipe, laid in Lowell's court, commencing at State street.

(128.) Two hundred and forty-eight feet of one and one-half inch wrought-iron cement-lined pipe, laid in Maple street, between Willow and Chapel streets.

(129.) One hundred and ninety-three feet of one and one-half inch wrought-iron cement-lined pipe, laid in Neptune street.

(130.) Forty-four feet of one and one-half inch wrought-iron cement-lined pipe, laid in Orange street, commencing at Fair street.

(131.) Three hundred and seventy-five feet of one and one-half inch wrought-iron cement-lined pipe, laid in Otis street, commencing at Prospect street.

(132.) Two hundred and fifty feet of one and one-half inch wrought-iron cement-lined pipe, laid in Pike street, commencing at Liberty street.

(133.) One hundred and thirty feet of one and one-half inch wrought-iron cement-lined pipe, laid in Plum street, between Olive and Elm streets.

(134.) Three hundred and fifty-eight feet of one and one-half inch wrought-iron cement-lined pipe, laid in Pond street, between Greenleaf and Hill streets.

59 (135.) Six hundred and seventy-five feet of one and one-half inch wrought-iron cement-lined pipe, laid in Russia street between Kent and Olive streets.

(136.) Five hundred and ninety-three feet of one and one-half inch wrought-iron cement-lined pipe, laid in Tremont street, between High and Prospect streets.

(137.) Five hundred feet of one and one-half inch wrought-iron cement-lined pipe, laid in Unicorn street, between Pleasant and Merrimac streets.

(138.) Fifty-five feet of one and one-half inch wrought-iron cement-lined pipe, laid in Vernon street, commencing at the end of the six-inch pipe.

(139.) Five hundred feet of one and one-half inch wrought-iron cement-lined pipe, laid in Warren street, between Munroe and Eagle streets.

(140.) One hundred and fifty-nine feet of one and one-half inch wrought-iron cement-lined pipe, laid in Toppan street, commencing at High street.

(141.) Two hundred and twenty-five feet of one and one-half-inch wrought-iron cement-lined pipe, laid in Franklin street, between Purchase and Milk streets.

(142.) Four hundred and twenty-five feet of one and one-half inch wrought-iron cement-lined pipe, laid in Smith's court, commencing at Water street.

(143.) Ninety feet of one-inch wrought-iron cement-lined pipe, laid in Bridge road, commencing at Merrimac street.

(144.) Eleven hundred and sixteen feet of one-inch wrought-iron cement-lined pipe, laid in Charter street, commencing at State street.

(145.) One hundred and twenty-nine feet of one-inch wrought iron cement-lined pipe, laid in Currier's court, commencing at Kent street.

(146.) Eighty feet of one-inch wrought-iron cement-lined pipe, laid in Middle street, commencing at State street.

(147.) Two hundred and twenty-two feet of one-inch wrought-iron cement-lined pipe, laid on Commercial wharf, commencing at Water street.

60 (148.) One hundred and twenty-eight feet of one-inch wrought-iron cement-lined pipe, laid in Cutter's court, commencing at Carter street.

(149.) One hundred and forty-five feet of one-inch wrought-iron

cement-lined pipe, laid in Boylston street, commencing at State street.

(150.) Two hundred and thirty-three feet of one-inch wrought-iron cement-lined pipe, laid in Ferry street, commencing at Water street.

(151.) Two hundred and eighty feet of one-inch wrought-iron cement-lined pipe, laid in Railroad avenue, commencing at Market street.

(152.) Sixty-four feet of one-inch wrought-iron cement-lined pipe, laid in Independent street, commencing at Liberty street.

(153.) One hundred and fifty feet of one-inch wrought-iron cement-lined pipe, laid in Pike street, commencing at the end of the one and one-half inch pipe.

(154.) Eighty-six feet of one-inch wrought-iron cement-lined pipe, laid in Jefferson street, commencing at the end of the one and one-half inch pipe.

(155.) Eighty-seven feet of one-inch wrought-iron cement-lined pipe, laid in Griffin's court, between Carter and Warren streets.

(156.) One hundred and fifty-five feet of one inch wrought-iron cement-lined pipe, laid in Papanti's court, commencing at Ocean street.

(157.) Two hundred and twelve feet of one-inch wrought-iron cement-lined pipe, laid in White's court, commencing at Merrimac street.

(158.) One hundred and twenty-five feet of one-inch wrought-iron cement-lined pipe, laid in Swap's court, commencing at Strong street.

(159.) One hundred and sixty-six feet of one-inch wrought-iron cement-lined pipe, laid in Brown's square, commencing at Green street.

(160.) One hundred and seventy-five feet of one-inch wrought-iron cement-lined pipe, laid in Town's court, commencing at Merrimac street.

61 (161.) Two hundred and fifty feet of one-inch wrought-iron cement-lined pipe, laid in Ashland court, commencing at Ashland street.

(162.) Two hundred and thirty-one feet of one-inch wrought-iron cement-lined pipe, laid in Coffin's court, commencing at High street.

(163.) One hundred and ninety feet of one-inch wrought-iron cement-lined pipe, laid in California street, between Merrimac and Water streets.

(164.) Fifty-two feet of one-inch wrought-iron cement-lined pipe, laid in Water street, commencing at the end of the two-inch pipe.

All as shown on the plan named in item 17 herein.

11. One hundred and sixty-six water gates upon said distribution pipes, the locations of which are shown upon said plan and in a record book named in item 20 herein.

12. One hundred and seventy-four fire hydrants connected with

said distribution pipe, the locations of which are shown upon said plan and record book.

13. Eight two-inch stand-pipes for supplying the street watering carts, located as follows:

One on Bromfield street, near High street; one on Federal street, near High street; one on State street, near High street; one on Market street, near High street; one on Kent street, near High street; one on Oakland street, near High street; one on Lunt's wharf, rear of market house; and one on Green street, below Pleasant. All as shown on said plan named in item 17 herein.

Twenty-two hundred and forty-six service pipes from said distribution mains to premises of consumers, with connections, fittings, valves, fixtures and appurtenances, the locations of which service pipes are shown in three application books and one service pipe record book, which books are named in item 16 herein. Said service pipe being numbered from one to twenty-two hundred and forty-six inclusive in said books, which books are now at the office of said company, at No. 2 Bartlett street, Newburyport.

15. The contract between said company and the City of Newburyport for supplying said city with water, dated Aug. 17, 1880, a copy of which contract is to be found upon page 362 of the municipal register of said city for the year 1893. Said contract being for the term of twenty years from Oct. 1, 1881.

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16. Three record books of applications for service pipe, marked "A," "B" and "C," respectively, and one service pipe record book containing a record of service pipes laid. Said books are now at the office of said company, at No. 2 Bartlett street aforesaid.

17. Plan of the water supply system of said company in said city, showing the location of said pumping station, stand-pipe, force and distribution mains and pipes, and locations of gates, valves and hydrants, entitled "Plan of Newburyport, Mass., with water distribution system of the Newburyport Water Company," scale one hundred and twenty-five feet to one inch; drawn by R. E. Curtis, dated 1886. Said plan being now at said company's office, at No. 2 Bartlett street.

18. Water rate register containing a list of the water takers of said company in said city, numbered one to twenty-seven hundred and twenty inclusive, with a record of the annual water rate paid by each taker, and the residence of such taker. Said register is now at said company's office at said No. 2 Bartlett street.

19. A meter register book showing a list of consumers taking water from said company by meter. Said book is now at the company's office.

20. A location record book showing the location of said gates, hydrants and pipes. Said book is now at said company's office.

21. Stock and construction tools in workshop at said No. 2 Bartlett street, Newburyport, as follows:

Three coffin hydrants, 1 Chapman hydrant, 1 Holyoke hydrant post, 31 one-inch stop and waste cocks, 141 corporation cocks, 70 service boxes, 35 yards rubber duck, 3 pairs rubber gloves, 2 six-

inch plugs, 1 eight-inch plug, 1 four-inch plug, 1 hand suction pump, 24 feet three-inch rubber suction hose, 3 rubber diaphragms for pump, 2 dozen files, 3 brass tops to hydrant spindles, 3 die stocks, 5 one-inch dies, 2 two-inch dies, 1 five-eighth inch die, 1 three-eighths inch die, 1 three-quarter inch die, 7 soldering irons, 250 one-inch couplings, 250 two-inch couplings, 150 one and one-half inch couplings, 18 three-quarter inch tees, 3 Johnson pumps, 50 feet one-eighth inch block tin pipe, 5 pipe-cutters, 2 pair pipe
63 tongs, 2 monkey wrenches, 1 coil one-fourth inch rope, 20 feet three-fourths inch lead pipe, 100 pounds solder, 1 box leather washers, 1 tool case, 3 tool wrenches, 2 hydrant wrenches, 2 spoons for cleaning out boxes, 1 iron bar, 2 tapping machines for cast-iron pipes, 4 four-inch iron sleeves, 1 six-inch iron sleeve, 1 eight-inch iron sleeve, 1 twelve-inch iron sleeve, 1 six-inch gate for cement pipe, 2 one and one-half Worthington meters, 2 three-quarter inch Crown meters, 1 one-half inch Crown meter, 1 set caulking tools, 1 dozen diamond points, 4 hand chisels, 1 street fire pot, 1 tool bench, 1 lining machine with cylinder and cones complete, 1 vise, 1 oiler, 1 oil can, 3 sets of cones for lining machine, 2 caulking hammers, 150 feet one-eighth inch wrought-iron pipe, 1 steel rod twenty-five feet long, 1 single block, 1 bow saw, 1 hand saw, 50 feet one-inch rope, 2 sieves, 5 picks, 27 shovels, 1 wooden horse, 3 tampers, 1 one-half barrels cement, 1 water tub, 1 dozen pick handles, 14 lanterns, 24 feet four-inch pipe, 25 feet six-inch pipe, 32 feet two-inch pipe, 25 feet one-inch pipe, 2 hoisting chains, 1 stove, 1 snow shovel, 2 brooms, 1 window washer, 25 pounds white lead, 1 solder mould, 2 feet two-inch lead pipe, 1 length six-inch sewer pipe, 1 furnace, 2 coal hods, 4 radiators, 1 iron gate, 1 mallet, 1 ratchet stock, 2 melting pots, 1 one and one-half inch union, 2 three-quarter inch unions, 2 dozen two-inch right and left couplings, 4 two-inch crosses, 3 winding sticks, 6 one and one-half inch elbows, 2 cement plugs, 4 water pails, 12 pounds jute, 2 pipe clamps, 1 fifty-foot tape, 150 pounds lead, 2 pounds resin, 1 bit stock, 1 zinc mat, gas fixtures in workshop.

22. Stock, supplies and tools at said pumping station buildings, as follows:

1 pair coal scales, 1 iron wheelbarrow, 3 wooden wheelbarrows, 1 two-foot stilson wrench, 1 fourteen-inch stilson wrench, 1 monkey wrench, 3 large gate wrenches, 2 sixteen foot ladders, 1 twelve-inch sleeve, 1 eight-inch sleeve, 1 six-inch elbow, 50 feet two-inch pipe, 75 feet one-inch pipe, 50 feet one-half inch pipe, 10 feet one-quarter inch brass pipe, 1 one and one-quarter inch valve, 1 one-inch union, 1 three-quarter inch union, 1 one-half inch union, 1 steam gauge, 1 water gauge, 1 vacuum gauge, 1 damper regulator, 2 steam
64 gauges, 1 fire alarm, 6 lamps and brackets, 9 curtains, 1 broom, 1 desk, 1 heater, 3 shovels, 3 picks, 2 tube cleaners, 2 pipe bars, 2 hoes for cleaning fires, 2 iron rakes, 1 oil can, 1 Crosby lubricator, with appliances, 1 large oil can, 2 small oil cans, 8 pounds Eureka packing, 20 gallons kerosene oil, 15 gallons cylinder oil, 2 gallons paint oil, 2 quarts spirits, 1 gallon

paint, 1 package of alabastine, 1 gallon japan, 1 two-inch tape, 1 two-inch die, 40 feet one-inch rope, 3 pounds waste, 1 lot two-inch plank, 1 light glass 12 x 18, 1 rain gauge, 5 feet sheet packing (rubber,) 4 one-quarter inch valves, 2 one and one-quarter inch tees, 3 two-inch elbows, 4 one-inch nipples, 2 three-inch elbows, 5 feet three-inch pipe, 1 two and one-half inch tee, 1 combination box, 1 three-eighth inch valve, 100 pounds white gravel for filter, 1 dozen bushings, about 75 tons Cumberland coal.

23. Construction tools owned by said company, described as follows:

(1.) Upon land owned by John Hoy, in said Newburyport, near Artichoke river:

One centrifugal pump, with 20 feet of pliable suction hose and proper discharge pipe fittings and appurtenances; 1 upright boiler, with smokestack and fittings; 18 picks, 18 shovels, 500 feet two-inch pipe, 100 feet five-inch pipe, 2 dozen two-inch elbows, 2 dozen two-inch couplings, 2 dozen two-inch nipples, driving weight and clamp for two-inch pipe, 2 hand pumps, 100 feet three-fourths inch pipe, 100 feet one-inch pipe, 2,000 feet loose lumber, board measure, 1 tool box.

(2.) Upon stand-pipe lot described in item 5 herein:

One twelve by eight branch, 9 twelve by four inch branches, 4 four by four branches, one twelve by twelve branch, 48 feet twelve-inch pipe, cast iron, 12 feet eight-inch pipe, cast iron, 1 twelve by eight inch tee, 1 twelve-inch elbow.

24. Office furniture and fixtures now at the office of said company, at said No. 2 Bartlett street, as follows:

Ten office chairs, 1 counter desk, 1 roll-top desk, 1 letter-press, 1 directors' table, 1 tapestry carpet, 1 clock, 1 couch, 1 feather duster, 1 counter rail, 1 letter box, 6 curtains, 1 case for papers and letters, 1 brush holder, 2 brushes, 1 desk stool, gas fixtures, 3 door mats, 11 towels, 1 bottle ink.

65 25. All the debts due said company from water takers, as shown by the books of the company herein named. Also all insurance policies of said company by which any of the property herein conveyed is insured against fire.

26. All the rights, privileges and easements heretofore acquired under chapter 235 of the Acts of the Legislature of Massachusetts for the Year 1880, and now used by said company, of laying and maintaining water pipes and mains in said streets, and of making connections therewith for the purpose of supplying said city and the inhabitants thereof with water, and all property, property rights, corporate property, privileges, easements, waters and water rights of said company, whether herein particularly described or not, and all the rights and franchises of said company, whether for supplying water to the city of Newburyport and the inhabitants thereof, and of collecting water rates therefor or otherwise.

Hereby conveying to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all apparatus and appli-

ances owned by said company and used in supplying said city and the inhabitants thereof with water.

To have and to hold the granted premises, with all the privileges and appurtenances thereto belonging, to the said City of Newburyport, its successors and assigns, to its and their use and behoof forever, for the purposes authorized by law.

And the said Newburyport Water Company doth hereby covenant with the said City of Newburyport, and its successors and assigns, that the granted premises are free from all incumbrances made or suffered by it, and that it will, and its successors shall, warrant and defend the same to the said City of Newburyport and its successors forever against the lawful claims and demands of all persons claiming by, through or under it, but against none other.

In witness whereof the said Newburyport Water Company hath caused these presents to be signed in its name and behalf by W. Herbert Noyes, its president, and George H. Norman, Jr., its treasurer, thereto duly authorized by vote, a copy whereof is hereto annexed, and its corporate seal to be hereto affixed, this twenty-
66 ninth day of January, in the year of our Lord one thousand eight hundred and ninety-five.

THE NEWBURYPORT WATER COMPANY, [L. S.]
By W. HERBERT NOYES, *President.*
GEO. H. NORMAN, JR., *Treasurer.*

Executed in presence of
F. L. EVANS.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, ss:

JAN. 29, 1895.

Then personally appeared the above-named George H. Norman, Jr., treasurer, and acknowledged the foregoing instrument to be the free act and deed of the said Newburyport Water Company, before me,

F. L. EVANS,
Justice of the Peace.

COMMONWEALTH OF MASSACHUSETTS, *Essex*, ss:

JAN. 29, 1895.

Then personally appeared the above-named W. Herbert Noyes, president, and acknowledged the foregoing instrument to be the free act and deed of the said Newburyport Water Company, before me,

F. L. EVANS,
Justice of the Peace.

At a special meeting of the stockholders of the Newburyport Water Company, a corporation, duly called for the purpose, and

held at Newburyport on the tenth day of July, A. D. 1894, the following vote was passed:

"*Voted*, That this company desires to sell to the City of Newburyport, Mass., all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company, and used in supplying said city and the inhabitants thereof with water, and John E. McCusker, the clerk of the company, is hereby authorized and directed to notify the mayor of said city, within thirty days from the fourteenth day of June, 1894, in
67 writing, that the company so desires, agreeably to the provisions of chapter 474 of the Acts of the Legislature of Massachusetts for the Year 1894, and the president and treasurer of said company are hereby authorized and directed, in case said city shall vote to purchase said property, as provided by said act, to execute and deliver to said city, within twenty days after said vote of said city proper deeds and instruments in writing, conveying to said city the property aforesaid."

Attest: JOHN E. McCUSKER,
Clerk of the Newburyport Water Company.

Exhibit K.

City of Newburyport.

In Board of Alderman, *Jan.* 31, 1895.

Present: His honor Mayor Gurney, Aldermen Noyes, Perkins, Kimball, Blumpey, Johnson and Hoyt.

No. 29.

On motion of Alderman Perkins: Ordered, the common council concurring, that the mayor be and hereby is authorized and instructed to accept, on behalf of the city, the conveyance and property of the Newburyport Water Company, as tendered by said company in accordance with chapter 474 of the Acts of 1894, upon the following terms:

To the Newburyport Water Company:

In accepting the conveyance made to the City of Newburyport by the Newburyport Water Company, dated Jan. 29, 1895, and delivered to the mayor on that day by the clerk of that corporation for examination, it is not admitted, on behalf of the city, that any franchise is acquired by the said city under such conveyance, or that the city is under any obligation to make payment on account of any franchise of said corporation by reason thereof.

It is further not admitted or claimed that the four filters, with their gates, pipes, appliances and appurtenances, described in item

2 of said deed, as situated upon the second lot of land described in item 1 therein, are used in supplying said city or its inhabitants with water, or that the city is bound to pay for the same or any part thereof.

It is further not admitted or claimed that the Newburyport Water Company has any right or authority to convey by said conveyance, or the City of Newburyport to accept or make payment for
68 anything whatsoever, except according to provisions of chapter 474 of the act of 1894.

Adopted by a unanimous yea vote, six aldermen present and voting. Came up from the common council indorsed, "Adopted in concurrence by a unanimous yea vote, fifteen members present and voting."

Attest:

[SEAL.] GEORGE H. STEVENS, *City Clerk.*

EXHIBIT L.

COMMONWEALTH OF MASSACHUSETTS:

NEWBURYPORT WATER COMPANY
v.
CITY OF NEWBURYPORT.

Decided by supreme judicial court of Massachusetts, June 14, 1897.

Copy of Opinion.

HOLMES, *J.:*

The price to be paid by the City of Newburyport to the Newburyport Water Company for what it purchases under statute 1894, chapter 474, is not left to the discretion of the commissioners. A rule is given to them by the statute, and it is not improper that the manner in which that rule has been interpreted and carried out should be reported for the supervision of this court before the acceptance of their report. Kingman, petitioner, 153 Mass. 566, 579. We are not disposed to criticise even the reporting of questions of evidence by agreement of parties, so far as it may seem possible that they had a substantial bearing upon the result. But we should not recommit the report upon a matter of evidence unless we could see some probability of an appreciable change in the report upon the correction of the mistake.

The chief complaint of the petitioner is that no allowance is made for its right to lay and maintain pipes in the streets and its right to collect water rates. There was much discussion whether these are among the "rights" which the city buys under sect. 1 of the
69 act, and, if so, whether they are embraced in the provision that the value of the property shall be estimated without enhancement on account of, among other things, the franchise of the

company. As bearing upon this there was a good deal of argument as to whether statute 1893, chapter 471, was in force, the city having voted not to purchase the petitioner's property as therein provided, but afterwards having voted to accept the act. We do not think it necessary to go into these considerations, or even to examine with great accuracy how far the rights in question have not been allowed for. The direction to "determine the fair value of said property for the purposes of its use by said city" is clear enough without going into controverted questions. Whatever the city purported to purchase, (see Abbot *v.* New York & New England Railroad, 145 Mass. 450, 453; State *v.* Sherman, 22 Ohio St. 411, 428; Coe *v.* Columbus, Piqua & Indiana Railroad, 10 Ohio St. 372, 387), the petitioner's right to lay pipes in the streets was of no use to the city. The city had that right by virtue of the legislative authority to furnish water. Water pipes are not an additional burden to the highway. Pierce *v.* Drew, 116 Mass. 75, 81, Lincoln *v.* Commonwealth, 164 Mass. 1, 10. And as soon as the city was authorized by the legislature to furnish water no one could complain if it proceeded to lay pipes for that purpose. Assuming that the act of 1893 was not in force, and admitting that a purchase from the petitioner was a condition precedent to the exercise of any rights under the act of 1894, still it is plain that when once the purchase was made, the act of 1894 conferred upon the city directly, and not merely or at all as successor to the water company, the right to supply itself and its inhabitants with water, as if under the act of 1893, in case the water company had not offered to sell under that act. A similar answer may be made with regard to the right to charge water rates. St. 1894, chap. 474, sect's 2, 4; St. 1893, chap. 471, sect's 1–3, 8, 13. "It is the statute, and not the company which originally constructed the (water works), which confers upon the local authority this right." Edinburgh Street Tramway Co. *v.* Edinburgh (1894), A. C. 456, 464, 465.

It must be remembered that the transaction before us springs out of a voluntary offer by the petitioner to sell upon the statutory
70 terms, and therefore there is no reason to try to bend those terms in its favor. Of course, an offer by a water company, made under the threat of municipal competition and to avoid ruin, might be voluntary only in name. But we have no reason to assume in this case that the petitioner is the victim of robbery, and must treat it as having acted of its free choice in fact as well as in form.

The other obbjection most insisted upon by the petitioner is the exclusion of evidence of its net earnings in the past. Had the evidence been admitted it is improbable that we should have recommitted the report on that ground. We are not disposed to recommit it because the evidence was excluded. The net income, no doubt, would be an indirect way of getting at the value of the capital in a transaction between individuals. It is not necessary to say that it would throw no light on the different question which the commissioners had to answer under the statute. But the question was a different one. Their duty was to find the fair value of the property for the purposes of its use by the city, and they were to find it with

out enhancement on account of future earning capacity or good will, or on account of the franchise of the company. It is doubtful whether the evidence would not be held inadmissible in England as an attempt to get an allowance for "future earning capacity," although the way in which these words are used in statute 1891, chapter 370, sect. 12, points to a narrow construction of them in the act before us. Edinburgh Street Tramway Co. *v.* Edinburgh (1894), A. C. 456, 466. In this country it has been said that basing the value upon earnings is in effect valuing a franchise which no longer exists. National Water Works Co. *v.* Kansas City, 62 Fed. Rep. 853, 864. Even in an ordinary transaction the test would not be past profits but market value, if that could be ascertained. Montgomery County *v.* Schuylkill Bridge Co., 110 Penn. St. 54, 60; *In re* Kensington & Oxford Turnpike Co., 97 Penn. St. 260; Stockton & Copperopolis Railroad *v.* Galgiani, 49 Cal. 139. Compare "fair market value for the purposes of its use." St. 1891, chap. 370, sect. 12. At all events, the different conditions under which the property would be used by a municipal corporation seeking only reimbursement,
71 not profit, so diminish the instructiveness of the figures offered that, even if admissible, we think that they ought not to have affected the result.

The commissioners state the elements of valuation which they have taken into account. In addition to the value of the tangible property and easements, they have allowed forty thousand dollars for the fact that the plant was a going concern and in full operation. They have allowed for everything for which the petitioner was entitled to be paid. They have approached the question in a manner in which it was within their discretion to approach it. National Water Works Company *v.* Kansas City, 62 Fed. Rep. 853. If capitalizing profits would give a much greater excess over the value of the land, water, easements and plant of the company than the commissioners allowed, the reasons are to be found in the franchise and monopoly of the company, in its right to lay pipes in the streets, and partly, perhaps, in the personal skill of the management, none of which are things for which the city is to pay.

The officer who made the tax returns setting forth the value of the stock of the company was called by the petitioner and testified to the value of the company's property. On cross examination, the respondent was allowed to identify the tax returns made by him, and to put them in. The returns had some tendency to show a smaller value of the property than that given on the stand by the witness, and so to contradict him, and were admissible on that ground, even if they did not amount to admissions by the corporation itself.

It appears to us questionable, at least, whether evidence that insurance rates were higher than the standard rates, and were advanced because of defects in the water system, would be admissible before a jury upon a question of value. Yet as an actual price paid in the market because of a specific fact, the objection to it is not that it is *res inter alios*, but rather that it is too remote from the question

at issue to give much help. See Call *v.* Allen, 1 Allen, 137, 144. We do not see how it could do any harm beyond tending to prove that the water works were not as good as the average; a fact which, if proved, hardly could affect a valuation arrived at as the commissioners arrived at it.

We are not prepared to say that the price of Mr. Norman's stock was inadmissible. But it gave a value for the total property
72 so far away from the award that it is not necessary to discuss the question, since it was not adopted as a standard.

The evidence of the sum paid Jackman by the city for the use of his spring, as bearing on the value of the water, does not appear to have been opened to the objection that his acceptance of it practically was compulsory, as in Cobb *v.* Boston, 112 Mass. 181, and Sawyer *v.* Boston, 144 Mass. 470. It seems not to have been very different from the price paid by the petitioner.

It was within the commissioners' power to award costs. Jones *v.* Carter, 8 Allen, 43; McLaughlin *v.* Old Colony Railroad, 166 Mass. 260.

Commissioners' award accepted.

73 *Amendment to Bill of Complaint.*

(Filed Sept. 1, 1897.)

Now comes the complainant, before answer is filed by the defendant, and amends its bill of complaint as follows:

1. In paragraph numbered 14, in the third line from the last of clause (*a*) thereof (printed page 18, line 13) strike out "5" and insert in lieu thereof "14" so that the phrase shall read, "and was in violation of article 14 of the amendments to the Constitution of the United States, and of plaintiff's rights thereunder."

2. By striking out clause (*b*) of said paragraph numbered 14, and inserting in lieu thereof the following:

"(*b.*) That by said legislation, as construed and applied as aforesaid, the State or Commonwealth of Massachusetts deprived and deprives plaintiff of its property without due process of law, in violation of said article 14 of amendments to the Constitution of the United States, and of plaintiff's rights thereunder."

3. By striking out clause (*c*) of said paragraph numbered 14, and inserting in lieu thereof the following:

"(*c.*) That said legislation, as construed and applied as aforesaid, impaired and impairs the obligation of contracts belonging to said company and to its stockholders, in violation of section 10 of article 1 of the Constitution of the United States, and the plaintiff's rights thereunder."

4. By striking out clause (*d*) of said paragraph numbered 14, and inserting in lieu thereof the following:

"(*d.*) That by said legislation, as construed and applied as aforesaid, the State or Commonwealth of Massachusetts denied and denies

to plaintiff and its stockholders the equal protection of the laws in violation of article 14 of the amendments to the Constitution of the United States, and of plaintiff's rights thereunder."

5. By inserting in clause (*e*) of said paragraph numbered 14, after the word "construed," in the phrase "to wit, that said act of 1894, as construed," the words "as aforesaid."

Also in the same clause, by striking out the word "used," in the phrase "at the end of which period the corporeal property
74 would be worth somewhat less then when used," and substituting for said word "used" the word "new."

6. By adding to said paragraph numbered 14 the following clause:

(*f*.) That the effect of said act of 1894, and said act of 1893, as re-enacted by said act of 1894, under the circumstances alleged, and as construed by said supreme judicial court in said opinion, was to violate plaintiff's rights under the Constitution of the United States, and that said act of 1894, including said act of 1893 as re-enacted by said act of 1894, is unconstitutional (under the Constitution of the United States) and void.

7. By inserting in the "first" paragraph of the prayer, after the phrase, "general court of Massachusetts," the figures "1894."

8. By striking out from the "second" paragraph of the prayer the word "in," preceding the word "unconstitutional," and substituting the word "is."

9. By striking out the "eighth" prayer, and substituting therefor the following:

"*Eighth.* That the defendant be restrained from making, executing, negotiating and issuing any bonds, notes or scrip under the provisions of said act of 1894; and also from attempting in any way to enforce said award; also that defendant be restrained from extending, changing, parting with, encumbering, or wasting in any way, the system, or plant and property described in said deed, and from operating in any form upon the security of such property, and from paying out for any purpose but the purpose of operating said system and plant and making necessary repairs upon the same, any of the funds or revenue arising out of said system, plant and property."

NEWBURYPORT WATER COMPANY,
By its solicitor, LAURISTON L. SCAIFE.

LAURISTON L. SCAIFE, *Of Counsel*.

75 *Demurrer.*

Filed Sept. 27, 1897.

The respondent, The City of Newburyport, demurs to the complainant's bill in the above-entitled cause, and assigns as grounds of demurrer the following:

First. That the bill does not show that this court has jurisdiction

to entertain the same, or to administer any relief thereon; that it does not thereby appear that in law there has been any taking of the complainant's property, or any taking of property without just compensation, or without due process of law, or any impairment of the obligation of any contract, or any denial of the equal protection of the laws, or any other violation or invasion of any Federal right of the complainant, or that the case thereby stated is in law a case arising under the Constitution or laws of the United States.

Second. That the bill does not set forth or show any right to or ground of relief in equity against the complainant; and that it appears by the bill that the complainant thereby seeks to undo and reverse in a court of equity what has been properly done within its jurisdiction by a court of law.

Third. That it appears by the bill that the complainant thereby seeks to re-examine and re-try in this court a case brought by itself against this respondent, and already tried and determined in the supreme judicial court of Massachusetts, within its jurisdiction, in which case the subject-matter of this bill has been duly tried and determined between the parties hereto; and to revise, reverse and set aside the proceedings of said court, in and by this proceeding.

Fourth. That it appears by the bill that the complainant transferred its property to the respondent under circumstances and upon terms which in law constituted a contract between the parties hereto, and that all the provisions of said Massachusetts statute of 1894 entered into and became and were terms of the contract, upon which the respondent, in voting to purchase the complainant's property as alleged, and otherwise, had and still has a right to rely, and must be presumed to have relied; and that such contract, or the pro-
76 ceedings thereunder, cannot be rescinded, impaired, or otherwise affected, in or by means of this proceeding.

Fifth. That it appears by the bill that all acts of the respondent and all proceedings in the courts of Massachusetts, and all the consequences thereof, complained of and set out in the bill as grounds of jurisdiction or of relief in this court, in law proceeded solely from the voluntary acts of the complainant in offering for sale and selling its property to the respondent, and proceeding in the courts of Massachusetts for ascertainment of the value thereof, under the Massachusetts statute of 1894 as set out in the bill; and that such proceedings or consequences are not a lawful ground of complaint or objection on the part of the complainant, and that the complainant cannot in law disturb or question the same in or by this proceeding.

Sixth. That it appears by the bill that each and every Federal question thereby sought to be raised, or relied on as a ground of jurisdiction in this court, might have been raised by the complainant in the proceedings in the State court of Massachusetts set out in the bill, and properly reviewed by the judiciary of the United States in such proceedings, or might have been raised in this court, if at all, before trial of its case in the State court; and that by omitting then or there to raise any such question, and by its laches in the

premises, the complainant is debarred and estopped from maintaining the present bill.

Seventh. That it appears by the bill that a previous suit involving the same subject-matter is pending between the same parties in the supreme judicial court of Massachusetts having jurisdiction thereof, which suit, or the further proceedings therein, cannot in law be stayed or interfered with by means of this proceeding, which in law cannot be maintained pending said suit in the State court.

Wherefore, and for other good causes of demurrer appearing therein, the respondent demurs to the complainant's bill, and prays the judgment of the court whether it ought to be held to make further answer thereto.

A. E. PILLSBURY,
C. C. DAME,
Solicitors and of Counsel for the Respondent.

77 & 78 We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

A. E. PILLSBURY.
C. C. DAME.

UNITED STATES OF AMERICA, }
District of Massachusetts. }

NEWBURYPORT, *Sept.* 25, 1897.

I, Andrew R. Curtis, mayor of the city of Newburyport, on oath depose and say in behalf of the respondent that the foregoing demurrer of said city to the bill of complaint in the above-entitled cause is not interposed for delay.

ANDREW R. CURTIS.

Subscribed and sworn to by the said Andrew R. Curtis before me,
[SEAL] DAVID P. PAGE,
Notary Public.

February 24, 1898.

COLT, *J.:*

Demurrer overruled.

Attest: A. H. TROWBRIDGE, *Clerk.*

79 *Answer.*

(Filed April 14, 1898.)

The City of Newburyport, defendant in said cause, not waiving any rights under its demurrer heretofore filed to the plaintiff's bill, but reserving and insisting upon its rights thereunder, and under its appeal from the decision of the court thereon, so far as it may now or hereafter lawfully do, and without admitting the jurisdiction of the

court, makes answer to the bill, or to so much thereof as ought in law to be answered, as follows:

1. The defendant admits the averments set out in paragraph 1 of the plaintiff's bill.

2. It admits the averments set out in paragraph 2 of the bill.

3. The defendant is advised and alleges that all the averments set out in paragraph 3 of the bill, with the Exhibits B and C thereto annexed, are in law impertinent and ought not to have been inserted in the bill and ought to be expunged therefrom; and that the defendant is not required to make any further answer thereto.

4. The defendant is advised and avers that the averment of paragraph 4 that the act of 1880 therein referred to was obtained by the incorporators with the co-operation, assent and assistance of the defendant is in law impertinent and ought not to have been inserted in the bill and ought to be expunged therefrom; and that the defendant is not required to further answer the same. It admits the establishment of a water system, and the making of the contract annexed to the bill as Exhibit D, but denies that said contract gave the plaintiff company any exclusive right to furnish water to the defendant city or its inhabitants for the term of twenty years, or for any period of years, or under any conditions whatever. It admits that no vote was ever taken by the defendant city under section 11 of chapter 235 of the Acts of 1880 upon the question of purchase of the property of the plaintiff thereunder.

5. The defendant admits the averments of paragraph 5 of the bill, but avers that upon the delivery of the deed of Jan. 29, 1895, from the plaintiff company to the defendant city therein referred to, said contract was terminated by the voluntary act of the plaintiff;
80 or that the plaintiff was thereby disabled from further performing said contract; or that the contract was waived, or merged in and adeemed by the sale effected by said deed; and that it formed no part of the subject of the transfer or sale effected by the deed, and was not a subject of any claim or compensation thereunder.

6. The defendant is advised and avers that all the averments of paragraph 6 of the bill, except those relating to sections 3, 41 and 42 of chapter 105 of the Public Statutes of Massachusetts, which it admits, are in law impertinent and ought not to have been inserted in the bill and ought to be expunged therefrom; and further, that they are averments of conclusions of law and not of facts, which the defendant is not required to answer.

And without waiving this objection, but insisting thereon, the defendant denies each of said averments, and especially denies that any exclusive right to supply water in the defendant city, or any exclusive right of eminent domain, vested in the plaintiff company under said contract, or that the defendant thereby contracted not to compete with the plaintiff in furnishing water to itself or its inhabitants, or not to apply to the general court for legislation authorizing the same during the twenty years from Oct. 1, 1881, or at any time,

or that the defendant thereby became estopped to deny that the plaintiff had such exclusive rights.

7. The defendant is advised and avers that all the averments of paragraph 7 of the bill, except that the legislature of Massachusetts enacted chapter 471 of the Acts of the Year 1893, annexed to the bill as Exhibit E, which it admits, are in law impertinent and ought not to have been inserted in the bill and ought to be expunged therefrom; and that the defendant is not required to answer the same.

And without waiving this objection, but insisting thereon, the defendant denies that it ever petitioned the general court for an act to authorize it to compete with the plaintiff company in furnishing water without buying the plant of the plaintiff company; and denies that any such petition presented by it was in contravention of any vested rights of the plaintiff company as alleged, or in contravention of any policy ever existing in said Commonwealth not to authorize any city or town to compete in furnishing water, gas or electric light, with any private corporation engaged with its consent
81 in furnishing the same therein; and it denies that the plaintiff company ever had any vested rights under said act of 1880, or any exclusive right to supply water in the defendant city under said contract of Aug. 17, 1880, or otherwise; and denies that there is or ever was any such policy established or existing in said Commonwealth as averred in said paragraph.

And further answering the averments of said paragraph, if said averments, or the proceedings of the Massachusetts legislature, or the conduct or proceedings of the parties, prior to the passage of the act of 1893, are material or relevant to this suit, the defendant says that during the latter part of the year 1892 and the early part of the year 1893, prior to the hearing before the legislative committee upon the defendant's petition referred to in said paragraph, it was discovered that the plaintiff company, in violation of law and of its duty to the inhabitants of the defendant city under its charter and contract, and of its obligation to furnish pure and wholesome water to the inhabitants of the city, was surreptitiously pumping into its water supply, and delivering to the inhabitants of said city for drinking and for all other domestic purposes, the waters of the Merrimac river, upon the bank of which its works were situated, which waters, at the point where they were taken from the river and introduced into the water supply of the plaintiff company, were charged with the sewage of the cities of Lowell, Lawrence and Haverhill, and of several towns, of an aggregate population amounting to about two hundred thousand people; that in consequence of the introduction by the plaintiff company of this corrupted water into its water supply furnished and delivered to the inhabitants of the defendant city, an epidemic of typhoid fever and of winter cholera broke out in said city during the winter of 1892 and 1893, which led to investigation of the conduct of the company and to discovery by the inhabitants of the city of its secret introduction of the water of the Merrimac river into its water supply; that the inhabitants of the defendant city there-

upon became greatly alarmed, and went to the legislature for relief by their petition referred to in said paragraph 7, and that the facts above set forth were admitted by the plaintiff company, or were otherwise proved before the legislature, and that this conduct of the plaintiff company was the principal cause which moved the
82 inhabitants of the defendant city to seek such relief, or to seek any legislation on the subject, and in part moved the legislature to the passage of the act of 1893, being Exhibit E annexed to the bill.

8. The defendant admits the averments of paragraph 8 of the bill relating to the vote of its inhabitants upon the purchase of the property of the plaintiff under the act of 1893, and upon the acceptance of said act. The defendant denies that thereupon, or at any time, it threatened to establish a system of water supply for the defendant city or its inhabitants, or to compete with and ruin the plaintiff, and avers that it never took any further formal or official action under said act of 1893 after the votes set out in said paragraph, or any action thereunder, except to make some examination of another source of water supply.

The defendant is advised and avers that all the further averments of said paragraph 8 not hereinbefore answered, with Exhibits F and G annexed thereto, except that the legislature of Massachusetts duly passed chapter 474 of the Acts of the Year 1894, annexed to the bill as Exhibit H, which it admits, are in law impertinent and ought not to have been inserted in the bill and ought to be expunged therefrom; and that the defendant is not required to answer the same.

And without waiving this objection, but insisting thereon, the defendant, if required to make any further answer to said paragraph 8, denies that during the pendency of the plaintiff's petition therein referred to, the defendant city, by its mayor, counsel or otherwise, threatened to compete with the plaintiff company in supplying water to itself and its inhabitants, or to ruin the plaintiff by such competition; and it denies that the act of 1894, annexed to the bill as Exhibit H, was passed by the legislature without the assent or against the contention of the plaintiff, and says that said act was passed at the sole intervention and solicitation of the plaintiff, to avoid and nullify the act of 1893, and prevent the city from supplying itself with water thereunder, and against the opposition of the defendant; and that the plaintiff was earnestly desirous of obtaining such act, and immediately upon the passage thereof accepted the same, and took full advantage thereof for its own benefit, as in the plaintiff's bill fully appears.

83 9. The defendant admits that chapter 474 of the Acts of 1894 was as quoted in said paragraph 9, so far as quoted therein. It is informed and believes, and therefore admits, that a notice was issued for a meeting of the stockholders of the plaintiff company, as therein set forth, and that such meeting was held and that a vote was there passed to sell to the defendant the property of the plaintiff company, as therein set forth, and that notice thereof

was given the defendant; and it believes Exhibit I to be a copy of such notice.

The defendant is advised and avers that the averments of said paragraph relating to the number of shares of stock in the plaintiff company, the number of shares represented at said meeting, and that some of the absent stockholders received no notice thereof, are in law impertinent and ought not to have been inserted therein and ought to be expunged therefrom; and that the defendant is not required to answer the same.

The defendant further denies that the question submitted to vote of the inhabitants of the defendant city, under the act of 1894, on or about Jan. 15, 1895, is correctly set forth in said paragraph 9, and avers that said question as submitted to the inhabitants of the defendant city also contained, following the terms thereof as quoted in said paragraph 9 of the bill, the further words: "in accordance with the provisions of section 1 of chapter 474 of the Acts of the Year 1894," so that the question submitted and voted upon was whether the defendant city should purchase the rights, privileges, easements, etc., of the plaintiff company, "in accordance with the provisions of said section 1 of chapter 474 of the Acts of 1894;" that the defendant city never contemplated or undertook the purchase of any property of the plaintiff company, except under and in accordance with the terms of said vote as thus set forth, and under and in accordance with the terms of said section 1 of the act of 1894; and that the terms of said act and said vote constituted a contract, and the only contract, of purchase and sale of said property by the plaintiff company to the defendant city; and that the defendant city never purchased or took, and cannot be held to have purchased or taken, said property, or any part thereof, upon any terms except the terms of said contract. It admits that upon that question the vote of
84 its inhabitants was as set out in said paragraph. It admits that on or about Jan. 29, 1895, the plaintiff company executed and delivered to the defendant city the written deed, a copy of which is annexed to the bill as Exhibit J. It denies that by said deed, or otherwise, the plaintiff company had any power to enlarge, vary, or in anywise affect the terms or effect of the act of 1894, under authority of which it was made; and denies that the plaintiff had any legal right or authority to insert in said deed the words contained in paragraph 26 thereof: "all the rights, privileges and easements heretofore acquired under chapter 235 of the Acts of the Legislature of Massachusetts for the Year 1880, and now used by said company, of laying and maintaining water pipes and mains in said streets, and of making connections therewith for the purpose of supplying said city and the inhabitants thereof with water," or the words, "and all the rights and franchises of said company, whether for supplying water to the city of Newburyport and the inhabitants thereof, and of collecting water rates therefor, or otherwise;" or any right or authority to set forth in said deed, as part of the property conveyed thereby, the water-supply contract between the plaintiff and the defendant, dated Aug. 17, 1880; and it denies that the

insertion of said words in said deed were of any legal force or effect whatever to bind the defendant or otherwise; and denies that said contract or said franchise rights of the company therein so described formed any part of the property which the plaintiff was authorized to convey to the defendant, or which the defendant was required to purchase of the plaintiff under the act of 1894; and denies that they or any of them did pass to the defendant, or that the plaintiff thereby parted with, or that the defendant thereby acquired, the same or either thereof; and the defendant avers that the insertion of all said words in said deed was an unauthorized and unlawful attempt of the plaintiff to obtain compensation for its franchise rights and water contract, which it was not authorized to convey to the defendant, and which the defendant was not required to purchase and did not purchase of the plaintiff, and that such attempt was of no legal force or effect whatever.

The defendant denies that it ever accepted said deed or conveyance, except on the terms of the contract of purchase as defined and prescribed by the act of 1894; that it duly notified the plain-
85 tiff thereof by the vote, a copy of which is annexed to the bill as Exhibit K, which was duly communicated to the plaintiff; that such vote was not a vote of the board of aldermen, but was a vote of the city council of the defendant city duly approved; and that under the act of 1894, the plaintiff's deed, and the vote of the city and the notice thereof, the defendant city did not purchase any franchise rights of the plaintiff, nor the plaintiff's contract with the city, of Aug. 17, 1880, and the plaintiff did not convey the same or any part thereof, and it was not and is not entitled to be paid anything on account thereof.

The defendant avers that the said acts of 1893 and 1894 were in all respects a proper and valid exercise of the legislative power of Massachusetts; that they invaded no rights of the plaintiff; that the plaintiff was in all respects fully bound thereby; and that thereunder it had no right, power or authority to convey to the defendant city, and the defendant city was not thereby required to purchase, and never has purchased, any franchise rights of the plaintiff, or its right to lay water pipes in the streets of Newburyport, or the contract of Aug. 17, 1880; and that if any franchise rights of the plaintiff have passed to the defendant, they passed from the legislature directly, by virtue of said act of 1894, and not from the plaintiff, and are not a subject of compensation to the plaintiff.

The defendant admits that upon receiving said deed from said company, upon the terms of said vote and notice, it took possession of all the property described therein which was ever delivered to it, but not of said contract or of any franchise rights of the plaintiff; and that it still retains possession of the property so delivered, and collects revenue therefrom, and avers that it holds all said property in its own right, by a good and valid title, under and according to said conveyance and the act of 1894, under which it was made.

10. The defendant denies that the action of the plaintiff company detailed in paragraph 9 of the bill, and resulting in said conveyance

of Jan. 29, 1895, was voluntary in name and form only and was in fact compulsory, or that said offer of sale and deed were made by the plaintiff to the defendant under threat of municipal competition or to avoid ruin, or that said acts by which the defendant came into possession of the property described in said deed constituted a taking of such property; and the defendant avers that all of said proceedings of the plaintiff were in law and in fact voluntary; that the plaintiff itself sought and procured the statute under which said proceedings were taken; that it desired and welcomed the opportunity of selling its property to the city upon the terms of said statute; that the said action of the plaintiff corporation must be deemed in law voluntary, irrespective of the state of mind or the motives of any of its stockholders; and that no complaint or objection was ever raised by the plaintiff against said act of 1894 or the terms thereof until it had voluntarily and deliberately conveyed its property thereunder, proceeded for damages in the supreme judicial court of Massachusetts, and was dissatisfied with the amount of damages awarded; and that the claim and pretence of the plaintiff that its proceedings under the act of 1894 were compulsory, or that the act of 1894 or the act of 1893 is unconstitutional or in violation of any rights of the plaintiff, is a mere afterthought devised for the sole purpose of avoiding the unsatisfactory award of damages in the State court, and of obtaining, if possible, a new trial of its case in this court; and the defendant further avers that no proceedings of the parties set out in the bill, under the act of 1894, can in law be taken or held to be a taking of any property of the plaintiff, but that the same constituted a valid purchase thereof by the defendant, under and according to the terms of the act of 1894.

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11. The defendant admits the averments of paragraph 11 of the bill, except that it denies that the commissioners appointed by the supreme judicial court excluded from their valuation or from the amount of their award any property of the plaintiff, or any element of value thereof, which was conveyed by said deed, or for which the plaintiff was entitled to any compensation; and avers that said commissioners properly valued all the property of the plaintiff which passed by said conveyance, or for which the plaintiff was entitled to any compensation; and further, that they added to the amount of the valuation thereof, as fully appears by the bill and by their report as set out therein, the sum of forty thousand dollars ($40,000), in view of the fact that the plaintiff's property was a going concern and in full operation, no part of which the commissioners were required by law to add to or include in their award; and the plaintiff had no legal right to recover the same, or any part thereof; and that the award of the commissioners as set out in the bill should have been the sum of $235,000, which sum was found by the commissioners to be the value of the tangible property conveyed by the plaintiff, instead of the sum of $275,000.

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The defendant further says that the bill does not set forth a full

and exact copy of the commissioners' report and award, and craves leave to produce the same if material; and especially that it does not appear by the parts thereof set forth in the bill, that the commissioners did not find that the plaintiff company ever paid anything for its rights to lay water pipes in the defendant city.

12. The defendant admits the averments of paragraph 12 of the bill as to the proceedings in the supreme judicial court of Massachusetts therein set forth, except as hereinafter set forth, and it avers that the plaintiff's petition to said court for rehearing, therein set forth, has, since the filing of said bill, been dismissed. The defendant denies that it is or was ever doubtful whether the plaintiff was precluded from contesting in said cause, in said supreme judicial court, the constitutionality of said act of 1894; and avers that the same could have been contested by the plaintiff had any attempt been seasonably made so to do; and that no such attempt was ever made until it was made by the petition for rehearing, filed after said cause had been fully tried and gone to final judgment by acceptance by said court of the award of the commissioners; that it was open to the plaintiff in said cause to contest to the full extent the constitutionality or validity of the valuation clause of the act of 1894, which is the only clause thereof now or ever complained of by the plaintiff; and the defendant avers that, as more fully set forth hereafter, the negligence and omission of the plaintiff to question the constitutionality or validity of said legislation seasonably in said cause or elsewhere was such laches as now to bar and defeat the right of the plaintiff to question the same or to maintain this bill.

The defendant is advised and avers that the statements of said paragraph 12, relating to the argument of the plaintiff before the supreme judicial court of Massachusetts, or as to whether any of its stockholders did not assent to the sale and conveyance, or were
88 not notified of the special meeting, or were not present thereat, or never assented to the offer, sale, conveyance or delivery of its property by the plaintiff to the defendant, are in law impertinent and ought not to have been inserted in said bill and ought to be expunged therefrom; and that the defendant is not required to further answer the same.

13. The defendant says that all the averments of paragraph 13 of the bill are conclusions of law, to which the defendant is not required to answer; but the defendant denies the same and each thereof, and avers that said act of 1894 was a valid exercise of the power of the legislature of Massachusetts, and that thereunder the plaintiff had no right to sell, and never did sell, to the defendant, and the defendant was not required to purchase, and never did purchase, of the plaintiff, any franchise rights whatever, or the contract of Aug. 17, 1880; and that the plaintiff had no right to claim, and the defendant was not required to make, any compensation for any such franchise rights or for said contract; and the defendant denies that the acceptance by it of the plaintiff's deed was an acceptance or taking of any property, except of so much of the property therein described as the plaintiff was by the act of 1894 authorized to sell

and the defendant required to purchase; and that said conveyance was expressly made "in consideration of the compensation provided by said act" of 1894, which act expressly excluded therefrom any enhancement thereof on account of the franchise rights of the plaintiff, or of its future earning capacity or good will.

14. The defendant says that all the averments of paragraph 14 of the bill, except the averments as to the net income of the plaintiff and the value of its franchise rights, are conclusions of law to which the defendant is not required to answer: but the defendant denies the same and each thereof, and especially denies that the effect of said act of 1894, or said act of 1893, in connection therewith or otherwise, was to take any property of the plaintiff without the consent of the plaintiff, or of its stockholders or each of them, and avers that the plaintiff company voluntarily consented to convey and conveyed its property to the defendant under and in accordance with said acts, and that the consent of its individual stockholders thereto is non-essential and immaterial; and the defendant denies that the effect of said acts, or the proceedings thereunder, was to enable the
89 defendant to take any property from the plaintiff without just compensation or otherwise; it denies that said legislation as construed deprived the plaintiff of any property without due process of law, or impaired the obligation of any contract belonging to said company or its stockholders, or denied to the plaintiff or its stockholders the equal protection of the laws, or involved any other violation of the constitution of Massachusetts or of the United States; and it denies that the act of 1894, as construed by the court or otherwise, intended to give or transfer, or had any effect to give or transfer, any incorporeal or other property of the plaintiff to the defendant without payment therefor; and the defendant avers that the plaintiff was never entitled to any payment by the defendant for its right to use the streets of the defendant city for laying pipes and distributing water therein; that such rights were in no degree acquired from or under the contract of Aug. 17, 1880, between the plaintiff and the defendant, but were part of its general franchise rights, acquired from the legislature by and under its charter; that all such rights were fully within the control of the legislature of Massachusetts at all times; that the act of 1894 did not provide for or contemplate any transfer of any such rights by the plaintiff to the defendant; and that the legislature of Massachusetts had full power to provide, as it did provide in said act, that such rights should not be transferred to the defendant, or the defendant required to take or pay for the same, and full power to provide, as it did provide, that the valuation and payment for the property, which was to be and was transferred by the plaintiff to the defendant, should be ascertained without enhancement on account of any franchise rights of the plaintiff; and that the defendant city acquired and holds its franchise rights to supply itself with water, and to collect rates therefor, by direct grant from the legislature in and by said act of 1893 or said act of 1894, and not in any part from the plaintiff company.

The defendant further avers that under the provisions of said act of 1894 the net income of the company was immaterial and inadmissible to be considered; that it had and could have no lawful bearing upon the valuation of the property transferred in accordance with the terms of said act; and it denies that the franchise rights of the plaintiff are or ever were worth the sum of
90 $475,000, and says that the valuation so put upon them by the plaintiff in the bill is absurd, and is reached by deducting the amount of the commissioners' award from the capitalized net income of the company, which capitalized net income furnishes no indication whatever of the true value of the plaintiff's franchise rights at any time; and the defendant avers that the sum of $40,000, which was added by the commissioners in their award to the property value of the plaintiff's plant, as found by them, as appears by the bill, was in effect compensation for its franchise rights, future earning capacity and good will, though no compensation therefor was required, and was fully equal to the value thereof.

15. The defendant admits that on or about July 12, 1897, it took steps to issue bonds for the purpose of paying the amount of the award to the plaintiff company, but says that in view of the bringing of this suit it has since taken no farther steps thereto.

16. As to the averments of paragraph 16 of the bill, it denies that this suit arises under the Constitution of the United States, and avers that neither the legislation of Massachusetts, referred to in the bill, nor any proceedings thereunder, were or can in law be held to amount to a taking of property without just compensation, or impairment of the obligation of any contract, or denial to the plaintiff of the equal protection of the laws, or other violation or invasion of any right of the plaintiff under the Constitution of the United States; and it denies that this court has any jurisdiction to entertain this bill on account thereof or otherwise.

17. The defendant further answering said bill, especially that part thereof which seeks or prays damages or compensation for the property conveyed by the plaintiff to the defendant, says that all the matters and things set forth in the bill, and especially the plaintiff's claim to compensation for said property, have been fully tried and determined in the suit between the same parties in the supreme judicial court of Massachusetts, referred to and described in the bill, which court had full jurisdiction thereof, which jurisdiction was voluntarily invoked by the plaintiff; and that said suit had gone to final judgment before the filing of this bill, which judgment conclusively determines the rights of the parties in respect of all the matters and things set forth in the bill; and that they cannot be further heard, tried or examined herein; that the plaintiff's bill is an attempt
91 to review and retry a case already fully tried and determined in a competent tribunal of the plaintiff's choice; and that the plaintiff resorts to this court only because it is dissatisfied with the result of such trial, and with the amount of the award therein; that no new or different facts from the facts so tried and determined in the supreme judicial court of Massachusetts are presented in the

present bill, or now exist; and that the present bill is only an attempt to give a different legal effect to the same facts, in order to avoid the result of the proceedings in the State court, in view of the plaintiff's dissatisfaction with the amount of the award therein; and that all the matters and things set forth in the plaintiff's bill are *res judicata*.

18. The defendant further says that if the Massachusetts act of 1893 was unconstitutional or invalid as alleged, it was open to the plaintiff to raise that question by proceedings in the State court, or by original bill in this court, if that question can now be raised here, either before or after the passage of the act of 1894, and in either method to obtain a final adjudication thereon by the Supreme Court of the United States, if necessary to its rights; and after the passage of the act of 1894 it was open to the plaintiff to raise all questions of the constitutionality or validity of either act by proceedings in the State court, or by original bill in this court, if this court now has any jurisdiction thereof; that the only complaint of the plaintiff against the act of 1894 is against the valuation clause in section 1 thereof; and that it was open to the plaintiff in its proceedings for compensation in the supreme judicial court of Massachusetts, as described in the bill, to raise all questions of the constitutionality or validity of said provisions for valuation, and to obtain a final adjudication thereon, if necessary, by the Supreme Court of the United States; that notwithstanding these facts, the plaintiff did not seasonably raise or attempt to raise, in or by any proceeding in either court, any question of the constitutionality or validity of any provision, either of the act of 1893 or of the act of 1894, but voluntarily accepted and took the full benefit of the act of 1894, according to its terms; offered its property to the defendant, for sale thereunder, by formal and deliberate vote of its stockholders; conveyed the same to the defendant by formal deed, by and
92 under authority of a vote of its stockholders, which deed was expressly made in consideration of the compensation provided by the act of 1894; proceeded in the State court under the terms of said act for ascertainment of such compensation, and fully tried in that court all questions bearing upon the same; all by a course of proceedings occupying a period of more than two years; and that the plaintiff throughout this period, or throughout the proceedings in the State court, neither raised nor suggested any question of the constitutionality or validity of the act of 1893 or the act of 1894; and that during said period, the defendant city, upon the faith of the plaintiff's acceptance of the act of 1894, and its deed and other proceedings thereunder, as hereinbefore and in said bill set forth, expended large sums of money, amounting to about fifty thousand dollars ($50,000), upon and in the necessary improvement of the property so conveyed by the plaintiff to the defendant, and other sums amounting to about fifty thousand dollars ($50,000) in its conduct of the proceedings brought by the plaintiff in the State court, and incurred other expenditures and obligations on the faith of the plaintiff's conduct and of said purchase; and the defendant

says that this conduct of the plaintiff, and its omission to raise any question of the validity of the act 1893 or the act of 1894, or of the validity of any proceedings thereunder, until the final termination of the proceedings in the State court by an award unsatisfactory to the plaintiff, and acceptance thereof by the full court, is laches whereby the plaintiff is barred from now questioning the validity of said legislation or proceedings, and from maintaining this bill.

19. The defendant further says that whether the Massachusetts act of 1894 was or was not satisfactory to the plaintiff, the plaintiff voluntarily accepted the same, and took the full benefit thereof, by offering its property for sale to the city thereunder, and by conveying the same to the city thereunder, and by proceeding under and according to said act for ascertainment of the price or value thereof, all as set out hereinbefore and in the plaintiff's bill; and that the plaintiff must be held in law to have voluntarily accepted said act of 1894 with all its consequences, and to have conclusively waived any objection thereto; and that the plaintiff is now estopped to deny
or question the constitutionality or validity of said act of 1893
93 or said act of 1894, or the validity of any of the proceedings
thereunder, in any particular, or to maintain this suit for that or for any other purpose.

20. The defendant further says that the plaintiff's deed of Jan. 29, 1895, by which it conveyed its property to the defendant, annexed to the bill as Exhibit J, was in fact and must in law be held to be voluntary and binding upon the plaintiff; that the same was not made under any legal duress or constraint, or under any circumstances which afford the plaintiff any right to avoid or question the same, or the full effect thereof, according to its terms; that said deed was expressly made in consideration of the compensation provided for such conveyance by said act of 1894, to be ascertained as therein provided; that by said deed the plaintiff is estopped to deny or question that the defendant now holds all the property thereby conveyed, which the plaintiff was by said act of 1894 authorized to convey to the defendant, or the defendant thereby required to purchase, by a good and valid title, and is estopped to claim that the compensation ascertained in accordance with said act of 1894, by the commissioners, and approved by the supreme judicial court of Massachusetts, as set out in the bill, is not full and lawful compensation for all the property conveyed by said deed, or which the plaintiff was by the act of 1894 or otherwise authorized to convey to the defendant or the defendant required to purchase of the plaintiff; and that by said deed the plaintiff is estopped to maintain this suit for any purpose.

21. The defendant further says, especially in answer to that part of the plaintiff's bill which seeks or prays ascertainment of compensation or damages due it for the property so conveyed to the defendant, that the proceedings of the parties under the Massachusetts act of 1894, as set out hereinbefore and in the plaintiff's bill, constituted a contract of purchase of the plaintiff's property, under and according to the terms of section 1 of said act, which terms became and

were the terms of said contract of purchase; that the defendant city voted to purchase said property on these terms and not otherwise; that if the defendant has not acquired the property on these terms it has not acquired it at all; that the defendant city cannot be held to have purchased or acquired any property of the plaintiff,
94 except under and according to the terms of such contract, as fixed and defined by said act, and for a price to be ascertained in accordance therewith; and cannot be held in this or any other proceeding to pay for said property any other price, compensation or damages, except as provided in said act and as ascertained in accordance with its terms; and that the plaintiff cannot have, in this or any other proceeding, any other or different ascertainment of the price or compensation to be paid for its property than that prescribed by the contract of purchase thereof, and awarded as set forth in the bill.

And the defendant claims the same benefit of the matters and things set out in the foregoing paragraphs, numbered 17 to 21, inclusive, as though the same and each of said paragraphs had been formally pleaded in bar of the plaintiff's bill.

22. The defendant further says that by and under the terms of section 3 of chapter 105 of the Public Statutes of Massachusetts, set out in the plaintiff's bill, being the reserved power over corporate franchises, the legislature of Massachusetts had full and absolute power to alter, amend or repeal the plaintiff's charter or franchise rights, or any part thereof, at its pleasure, without making or providing any compensation therefor; and that the provisions of said section 3 entered into, and in law formed a part and one of the terms of its charter, and an absolute condition upon which it held all of its franchise rights; that the plaintiff is a public service corporation, and that said legislature has inherent power of regulation and control over all such corporations; that said Massachusetts acts of 1893 and 1894 were respectively a proper and valid exercise of the power of the legislature of Massachusetts, and were in all respects fully binding upon the plaintiff; that said legislature had full power and authority to provide for a sale of the plaintiff's property as described in said act of 1894, for a price or compensation to be ascertained, without enhancement on account of any franchise rights of the plaintiff company, or its future earning capacity or good will, and had power to provide even for a taking or compulsory sale of said property without compensation for such rights; that all the proceedings of the parties, as set forth hereinbefore and in the plaintiff's bill, were valid and effectual in substance as they were in form, and all thereof are fully binding upon the plaintiff; that said proceedings
95 were not in fact, and cannot in law, be held to be, or to amount to, a taking or a compulsory sale of the property of the plaintiff or any part thereof, without just compensation or otherwise; and that in view of the powers of the legislature of Massachusetts, and of the proceedings of the parties under said legislation as aforesaid, the court has no jurisdiction to entertain the present bill or to administer any relief thereon, and the plaintiff has no right to

any relief in equity or otherwise, and the defendant ought not to be held to answer said bill, and the same ought to be dismissed.

23. The defendant further says, especially in answer to that part of the bill which seeks or prays reconveyance to the plaintiff of the property conveyed by it to the defendant as aforesaid, that upon the faith of the plaintiff's acceptance of the act of 1894, and its offer of sale, and its sale and conveyance of its property to the defendant thereunder, and of the proceedings of the plaintiff for ascertainment of the price thereof, under and according to the terms of said act of 1894, all as set forth hereinbefore and in the bill, it has expended large sums of money upon and in the necessary improvement of the property so conveyed to it by the plaintiff, amounting to about fifty thousand dollars ($50,000), by reason whereof said property has become and now is of much greater value than its value at the time of said conveyance, for all which expenditure and increased value the defendant is entitled to be allowed and compensated by the plaintiff in the event of reconveyance or restoration of said property to the plaintiff.

And the defendant denies each and every averment of the plaintiff's bill not hereinbefore admitted, denied or otherwise answered.

CITY OF NEWBURYPORT,
By GEORGE H. PLUMER, *Mayor.*

A. E. PILLSBURY,
C. C. DAME,
R. E. BURKE,
HORACE I. BARTLETT, *City Solicitor,*
Of Counsel.

DISTRICT OF MASSACHUSETTS:

BOSTON, *April* 13, 1898.

Personally appeared said George H. Plumer, and in behalf of the City of Newburyport made oath that the foregoing answer, by
96 him subscribed in behalf of said city, is true so far as it sets out the facts as of actual knowledge, and that it is otherwise true according to the best of his knowledge, information and belief.

Before me,
[SEAL.]

GRANT M. PALMER,
Notary Public.

Complainant's Exceptions to Defendant's Answer.

(Filed May 9, 1898.)

Plaintiff excepts to the answer of defendant herein filed, for impertinence in this:

Exception for impertinence.—For that the allegations in paragraph 7 of defendant's answer in the words following, to wit,

"And further answering the averments of said paragraph, if said averments, or the proceedings of the Massachusetts legislature, or the conduct or proceedings of the parties, prior to the passage of the act of 1893, are material or relevant to this suit, the defendant says that during the latter part of the year 1892 and the early part of the year 1893, prior to the hearing before the legislative committee upon the defendant's petition referred to in said paragraph, it was discovered that the plaintiff company, in violation of law and of its duty to the inhabitants of the defendant city under its charter and contract, and of its obligation to furnish pure and wholesome water to the inhabitants of the city, was surreptitiously pumping into its water supply, and delivering to the inhabitants of said city for drinking and for all other domestic purposes, the waters of the Merrimac river, upon the bank of which its works were situated, which waters, at the point where they were taken from the river and introduced into the water supply of the plaintiff company, were charged with the sewage of the cities of Lowell, Lawrence and Haverhill, and of several towns, of an aggregate population amounting to about two hundred thousand people; that in consequence of the introduction by the plaintiff company of this corrupted water into its water supply furnished and delivered to the inhabitants of the defendant city, an epidemic of typhoid fever and of winter cholera broke out in said city during the winter of 1892 and 1893, which led to investigation of the conduct of the company and to discovery by the inhabitants of the city of its secret introduction of the water of the Merrimac river into its water supply; that the inhabitants of the defendant city thereupon became greatly alarmed, and went to the legislature for relief by their petition referred to in said paragraph
7, and that the facts above set forth were admitted by the
97 plaintiff company, or were otherwise proved before the legislature; and that this misconduct of the plaintiff company was the principal cause which moved the inhabitants of the defendant city to seek such relief, or to seek any legislation on the subject, and in part moved the legislature to the passage of the act of 1893, being Exhibit E annexed to the bill,"

are impertinent and ought to be expunged.

A copy of said Exhibit E is hereto annexed and made part of this exception.

Plaintiff excepts to the answer of defendant herein filed, for insufficiency in this:

First exception for insufficiency.—For that the defendant hath not, to the best of its knowledge, remembrance, information and belief, answered the allegations contained in paragraph 3 of plaintiff's bill of complaint, which allegations are as follows:

"3. On information and belief, that in the year 1874, defendant, the said City of Newburyport, by a vote of its citizens, declined to ask for legislation authorizing a system of water supply for said city; that in 1878 (chapter 240) an act was passed by said general court which authorized the city to take a supply of water and to build a

plant for the distribution of water, which act required for its acceptance a two-thirds vote of the voters present and voting in said city of Newburyport. A vote was had thereon, resulting in the failure to accept said act.

A copy of said act of 1878, marked 'Exhibit B,' is hereto annexed and made part hereof.

That said act of 1878 (chapter 240) was continued in force by an act of the said general court, passed in 1879 (chapter 240), a copy of which last mentioned act, marked 'Exhibit C' is hereto annexed and made part hereof.

On information and belief that the incorporators of said act of 1880, prior to the passage of said act, petitioned said general court for the passage of such act, and, while such petition was pending the following order relating to said petition was adopted by said city:

'CITY OF NEWBURYPORT,
IN COMMON COUNCIL, *March* 8, 1880.

Ordered, the mayor and aldermen concurring, that his honor the mayor, for and in behalf of the city of Newburyport, be and is hereby authorized and instructed to sign in his official capacity the petition accompanying this order, and cause the seal of the city to be affixed thereto, and the city solicitor be and is hereby authorized and directed to present the same to the general court now in session, at his earliest convenience, and to use his best efforts to obtain
98 for the city an early and favorable consideration of the same by the legislature.'

That even after the passage of said act of 1880, it was, under sections 10 and 12 of said act of 1880, and said acts of 1878 and 1879, within the power of said City of Newburyport to establish a water system of its own; and, by voting so to do, and by carrying out the other provisions of section 12 of said act of 1880, to render inoperative said act of 1880, creating and establishing said Newburyport Water Company.

On information and belief, that said City of Newburyport did not accept said act of 1879, or otherwise comply with the provisions of said act of 1880, enabling it to establish a water system of its own; and that said acts of 1878 and 1879 became void, as provided in section 12 of said act of 1880."

Copies of said Exhibits B and C are hereto annexed and made part of this exception.

The defendant's allegations in its answer in respect to plaintiff's said allegations are set forth in paragraph 3 of defendant's answer as follows:

"The defendant is advised and alleges that all the averments set out in paragraph 3 of the bill, with the Exhibits B and C thereto annexed, are in law impertinent and ought not to have been inserted in the bill and ought to be expunged therefrom; and that the defendant is not required to make any further answer thereto."

Second exception for insufficiency.—For that the defendant hath not, to the best of its knowledge, remembrance, information and be-

lief, answered the following allegations in paragraph 8 of plaintiff's bill of complaint:

"That thereupon and thereafter" [*i. e.*, after the city had voted not to purchase under the act of 1893, and had voted to accept chapter 471 of the Acts of 1893] "it was claimed by the defendant that said chapter 471 of the Acts of 1893 was duly accepted and became effective, and that the defendant had the right thereunder to supply said city and its inhabitants with water and to receive revenue therefor;" ["that in this condition of affairs said city of Newburyport threatened thereupon to establish a system of water supply for said city of Newburyport and the inhabitants thereof, and to compete with and ruin plaintiff, The Newburyport Water Company, and that thereupon, plaintiff, The Newburyport Water Company,"—] (1) "fearing that said act of 1893 might be held to have been legally
99 accepted, and fearing that the property of said company would be damaged, ruined and destroyed by such threatened action of said city under said act of 1893,—presented to said general court, on or about the — day of ——, 1893, a petition praying for the passage of an act providing and requiring that said city should, before proceeding to supply water to itself or its inhabitants under said act of 1893, purchase the entire property of said company, or that, in some other suitable way, said company might be compensated for the damage resulting from the threatened competition by said city; that a copy of said petition, marked 'Exhibit F,' is hereto annexed and made part hereof; that with said petition said company presented a form of bill entitled 'An act to provide for the purchase of property of the Newburyport Water Company by the city of Newburyport,' a copy whereof, marked 'Exhibit G,' is hereto annexed and made part hereof; that said petition was referred to the committee on water supply; that said committee held hearings upon said petition, and that at such hearings both plaintiff and defendant herein were represented; that, during the pendency of said petition, said city, by its mayor, counsel and otherwise, threatened to compete with said water company in supplying water to said city and its inhabitants, and to ruin said company by such competition; that such competition would have greatly damaged said water company and would have ruined said company; that, as the result of the opposition and contentions made by said city to said general court or legislature of 1894, said company was unable to obtain the enactment of said bill or act, a copy whereof appeared annexed hereto as said Exhibit G; that without the assent, and against the contentions, of said water company before and to said general court or legislature, an act in lieu of said proposed act was passed by said general court or legislature, and constitutes chapter 474 of the Acts and Resolves passed by the general court of Massachusetts for the year 1894, a copy of which, marked 'Exhibit H,' is hereto annexed and made part hereof."

(1) What is quoted in brackets is answered, and is here inserted only as context to show the meaning and connection of the succeeding allegations.

Copies of said Exhibits F, G and H are hereto annexed and made part of this exception.

The defendant's allegations in its answer in respect to plaintiff's said allegations are set forth in paragraph 8 of defendant's answer as follows:

"The defendant is advised and avers that all the further averments of said paragraph 8 not hereinbefore answered, with Exhibits F and G annexed thereto, except that the legislature of Massachusetts duly passed chapter 474 of the Acts of the Year 1894, annexed to the bill as Exhibit H, which it admits, are in law impertinent and ought not to have been inserted in the bill and ought to be expunged therefrom; and that the defendant is not required to answer the same.

100 And without waiving this objection, but insisting thereon, the defendant, if required to make any further answer to said paragraph 8, denies that during the pendency of the plaintiff's petition therein referred to, the defendant city, by its mayor, counsel or otherwise, threatened to compete with the plaintiff company in supplying water to itself and its inhabitants, or to ruin the plaintiff by such competition, and it denies that the act of 1894, annexed to the bill as Exhibit H, was passed by the legislature without the assent or against the contention of the plaintiff, and says that said act was passed at the sole intervention and solicitation of the plaintiff to avoid and nullify the act of 1893 and prevent the city from supplying itself with water thereunder, and against the opposition of the defendant; and that the plaintiff was earnestly desirous of obtaining such act, and immediately upon the passage thereof accepted the same, and took full advantage thereof for its own benefit, as in the plaintiff's bill fully appears.

Third exception for insufficiency.—For that the defendant hath not, to the best of its knowledge, remembrance, information and belief, answered the following allegations in paragraph 12 of plaintiff's bill of complaint:

"That in such argument" (being the argument before the full court of the Commonwealth of Massachusetts upon the award of commissioners appointed under the petition of the Newburyport Water Company), "those who represented said company did not present or argue any claims or rights, under the Constitution of the United States, of said Newburyport Water Company, or of its stockholders generally, or of such of its stockholders as did not assent to the alleged sale and conveyance, or to the alleged offer in pursuance of which said sale and conveyance purport to have been made, and were not notified of the said special meeting of stockholders, and were not present, in person or by proxy, at said meeting, and have never assented to said alleged offer, sale or conveyance, or to any delivery thereunder of property of said Newburyport Water Company to the city of Newburyport;"

The defendant's allegations in its answer in respect to plaintiff's said allegations are set forth at the end of paragraph 12 of defendant's answer as follows:

"The defendant is advised and avers that the statements of said paragraph 12, relating to the argument of the plaintiff before the supreme judicial court of Massachusetts, or as to whether any of its stockholders did not assent to the sale and conveyance or were not notified of the special meeting, or were not present thereat, or never assented to the offer, sale, conveyance or delivery of its prop-
101 erty by the plaintiff to the defendant, are in law impertinent and ought not to have been inserted in said bill, and ought to be expunged therefrom, and that the defendant is not required to further answer the same."

In all *some or* of which particulars the said plaintiff is advised that the said answer of the defendant is evasive and insufficient, and ought to be amended, and humbly prays that the same may be amended accordingly.

L. L. SCAIFE,
Solicitor for Complainant.

ROBERT M. MORSE,
L. L. SCAIFE,
Of Counsel for Complainant.

EXHIBIT B.

Acts and Resolves of Massachusetts, 1878.

Chapter 240.

An act to supply the city of Newburyport with water.

Be it enacted, etc., as follows:

SECT. 1. The City of Newburyport is hereby authorized to supply itself and its inhabitants with pure water to extinguish fires, generate steam, and for domestic and other uses, and may establish public fountains and hydrants, and regulate their use, and may discontinue the same, and may collect such rents as may be fixed for the use of such water.

SECT. 2. Said city for the purposes aforesaid may take and hold the water, or so much thereof as may be necessary, not exceeding one and a half million of gallons daily, of any springs, natural ponds or brooks within the limits of said city, or of Kimball's pond in the towns of Amesbury and Merrimac, or any of the effluents from said pond; and may convey said waters or any part thereof into and through said city, and said town of Amesbury and the town of Salisbury; and may also take and hold, by purchase or otherwise, all necessary lands for raising, holding, flowing, diverting, conducting and preserving such waters, and conveying the same to any and all parts of said city, and of said towns of Amesbury and Salisbury; and may erect thereon proper dams, reservoirs, buildings,
102 fixtures, and other structures, and make excavations and embankments, and procure and run machinery therefor; and

for such purposes may construct and lay down conduits, pipes and drains, in, under or over any lands, water courses, roads or railroads, and along any street, highway, or other way other than a railway, in such manner as not to unnecessarily obstruct the same; and for the purpose of constructing, laying down, maintaining and repairing such conduits, pipes and drains, and for all other purposes of this act, may dig up, raise and embank any such land, street, highway or other way, in such manner as to cause the least hindrance to travel thereon; and in general may do any other acts and things necessary or convenient and proper for carrying out the purposes of this act. In case either of the towns in which said Kimball's pond is situated should hereafter apply for authority to take water from the same, the powers hereby granted shall not be construed as creating any priority of right, or operate to the prejudice of such application.

SECT. 3. Said City of Newburyport may, by vote of its city council, declare the quantity of water proposed to be taken under this act, not exceeding one and a half million of gallons daily, such vote to be passed not less than six months before the waters shall be withdrawn from said springs, ponds or brooks; and within sixty days from the time it shall take any lands, springs, ponds, brooks or water for the purposes of this act, otherwise than by purchase, said city shall file in the registry of deeds for the southern district of the county of Essex a description of such lands, springs, ponds, brooks or water, sufficiently accurate for identification, with a statement for the purposes for which the same are taken, together with a copy of such vote, if any has been passed, signed by the mayor of said city; and upon such filing, the terms of such vote shall be the measure and limit of the right of said city to take and divert the waters of such springs, ponds or brooks; but if no such vote is so passed and filed said measure and limit shall be one and a half million of gallons daily. If at any time said city shall take a larger quantity of water than said limit, it may be restrained by injunction from taking such larger quantity, in a suit in equity brought by any party interested.

SECT. 4. Said City of Newburyport shall be liable to pay all
103 damages that shall be sustained by any person or persons in their property by the taking of said waters or any part thereof as authorized by this act, or by the taking of any land, rights of way, water rights or easements, or by the erection of any dams, or the construction of any aqueducts, reservoirs, water ways or other works for the purposes of this act; and if the owner or owners of any property which shall be taken as aforesaid, or other person or persons sustaining damages as aforesaid, shall not agree on the damages to be paid therefor, he or they may apply by petition for an assessment of the damages at any time within three years from the taking of said property, or the construction of dams or other works occasioning damages as aforesaid, and not afterwards, to the superior court in the county in which the same are situated. Such petition may be filed in the clerk's office of said court, in vacation or in term

time, and the clerk shall thereupon issue a summons to the said City of Newburyport, returnable, if issued in vacation, at the next term of the said court to be held after the expiration of fourteen days from the filing of said petition, and if in term time, returnable on such day as said court shall order, to appear and answer to the said petition; the said summons shall be served fourteen days at least before the term or day at which it is returnable, by leaving a copy thereof and of the said petition, certified by the officer who shall serve the same, with the clerk of said city; and the said court may, upon default or hearing of said city, appoint three disinterested persons, who shall, after reasonable notice to the parties, assess the damages, if any, which such petitioner may have sustained as aforesaid; and the award of the said persons so appointed, or a major part of them, being returned into and accepted by the said court, shall be final, and judgment shall be rendered and execution issued thereon for the prevailing party, with costs, unless one of said parties shall claim a trial by jury as hereinafter provided.

SECT. 5. If either of the parties mentioned in section 4 shall be dissatisfied with the amount of damage awarded as therein expressed, such party may, at the term at which such award was accepted, or the next term thereafter, claim in writing a trial in said court, and have a jury to hear and determine at the bar of said court all questions of fact relating to such damages, and to assess the
104 amount thereof; and the verdict of said jury, being accepted and recorded by the said court, shall be final and conclusive, and judgment shall be rendered and execution issued thereon, and costs shall be recovered by the said parties respectively in the same manner as is provided by law in regard to proceedings relating to the laying out of highways.

SECT. 6. If said city takes the water from Kimball's pond or any of its effluents, it shall lay its aqueduct or main pipe, for conducting the same to said city, by some convenient route through the town of Amesbury. The inhabitants of any town upon the line of the works authorized by this act, upon the application of its board of selectmen, shall be entitled to the reasonable use of the water, for the same uses as are hereinbefore provided, upon paying an equitable compensation therefor, which in case of difference shall be determined by three commissioners, to be appointed by the supreme judicial court upon application of either party, and notice to the other, whose award, when accepted by said court, shall be binding upon the parties for the term of five years.

SECT. 7. Any town under whose roads, streets or ways said city lays its aqueduct or main pipe, may require said city to insert therein proper hydrants, at points not less than five hundred feet apart, to be used for the purpose of extinguishing fires, and for no other purpose. The expense of inserting said hydrants and keeping the same in repair shall be paid by such town.

SECT. 8. No application shall be made to the court for the assessment of damages for the taking of any water rights, or for any injury

thereto, until the water is actually withdrawn or diverted by said city under the authority of this act.

SECT. 9. If any person shall use any water taken under this act without the consent of said city, or shall wantonly or maliciously divert the water, or any part thereof, taken or held by said city pursuant to the provisions of this act, or corrupt the same, or render it impure, or destroy or injure any dam, aqueduct, pipe, conduit, hydrant, machinery or other works or property held, owned or used by said City of Newburyport under the authority of and for the purposes of this act, he shall forfeit and pay to said city three times the amount of damage assessed therefor, to be recovered in an action of tort; and on conviction of either of the wanton or malicious acts aforesaid, may be also punished by fine not exceeding three hundred dollars, or by imprisonment in jail not exceeding one year.

SECT. 10. For the purpose of paying all necessary expenses and liabilities incurred under the provisions of this act, said city shall have authority to issue coupon bonds to be denominated "Newburyport water bonds," to be signed by the treasurer of said city, to an amount not exceeding two hundred and fifty thousand dollars, payable at periods not exceeding thirty years from the date thereof, with interest payable semi-annually at a rate not exceeding six per centum per annum; and said city may sell said bonds at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper. And the city council of said city is hereby authorized from time to time to appropriate, grant and assess such sum or sums of money as shall be deemed expedient, towards paying said expenses, or the principal of the money so borrowed or obtained, and the interest thereof, in the same manner as money is appropriated, granted and assessed for other city purposes.

SECT. 11. The rights, powers and authority granted to the city of Newburyport by this act shall be vested in and exercised by a board of water commissioners, consisting of three citizens of said city, who shall be chosen by the city council, by joint ballot of both branches. The said commissioners shall, during their continuance in office, execute, superintend and direct the performance of all the works, matters and things mentioned in the preceding sections which are not otherwise specifically provided for in this act; and shall be subject to such ordinances, rules and regulations, in the execution of their said trust, as the city council may from time to time ordain and establish, not inconsistent with the provisions of law. They shall serve for the period of three years from the time of their appointment, unless the construction of the works herein contemplated shall be sooner finished. Thereafter the rights, powers and authority granted to the said city by this act shall be vested in and exercised by a board of water commissioners, consisting of three citizens of said city, who shall be chosen by the city council, by joint ballot of both branches, one for the term of one year from the first Monday of January in the year eighteen hundred and eighty-one, one for the term of two years, one for the term of three years,

and annually thereafter one water commissioner shall be chosen to serve for the term of three years. Said commissioners shall receive such compensation as the city council of said city may prescribe, and a majority of said commissioners shall be a quorum for the exercise of the powers and duties prescribed by this act.

SECT. 12. The said water commissioners shall establish such prices or rents for the use of water as to provide annually, if practicable, from the net income and receipts therefor, for the payment of the interest on said water bonds, and also, after three years from the introduction of the water into said city, for the further payment of not less than one per centum of the principal of said bonds. The net surplus income and receipts, after deducting all expenses, interest and charges of distribution, shall be set apart as a sinking fund, and applied solely to the payment of the principal of said bonds, until the same are fully paid and discharged. The "commissioners of sinking fund," as now established by ordinance of said city, shall be trustees of said fund, and shall annually, and as often as the city council may require, render an account of all their doings in relation thereto.

SECT. 13. The occupant of any tenement shall be liable for the payment of the rent for the use of the water in such tenement; and the owner thereof shall be also liable if, on being notified of such use, he does not object thereto.

SECT. 14. This act shall take effect upon its passage, and shall become void unless accepted by a vote of two thirds of the legal voters of the city of Newburyport, present and voting thereon, at a legal meeting which shall be called in their several ward rooms for that purpose, by the mayor and aldermen of said city, within one year from the passage of this act, at which meeting the check list shall be used.

Approved May 11, 1878.

107 EXHIBIT C.

Acts and Resolves of Massachusetts, 1879.

Chapter 240.

An act to revive "An act to supply the city of Newburyport with water."

Be it enacted, etc., as follows:

Chapter two hundred and forty of the Acts of the Year Eighteen hundred and seventy-eight, being "An act to supply the city of Newburyport with water," is hereby revived and continued for two years from the passage of this act.

Approved April 18, 1879.

Exhibit E.

Acts and Resolves Passed by the General Court of Massachusetts in the Year 1893.

Chapter 471.

An act to supply the city of Newburyport with water.

Be it enacted, etc., as follows:

Sect. 1. The City of Newburyport may supply itself and its inhabitants with water for the extinguishment of fires and for domestic, manufacturing and other purposes, and may establish fountains and hydrants, relocate or discontinue the same; may regulate the use of such water and fix and collect rates to be paid for the use of the same.

Sect. 2. The said city, for the purposes aforesaid, may take, by purchase or otherwise, and hold the waters of any pond, stream, spring or wells within the limits of said city not heretofore taken or purchased by the Newburyport Water Company, and the Artichoke river in West Newbury and Newburyport, and the water rights connected therewith; and obtain and take water by means of bored, driven, artesian or other wells on any land within said city, and hold and convey said water through said city and through said town of West Newbury from said ponds and said river; and may also take and hold, by purchase or otherwise, all lands, rights of way and easements necessary for holding and preserving such water
108 and for conveying the same to any part of said city of Newburyport; and may erect on the land thus taken or held proper dams, buildings, fixtures and other structures; and may make excavations, procure and operate machinery and provide such other means and appliances as may be necessary for the establishing and maintenance of complete and effective water works; and may construct and lay down conduits, pipes and other works, under or over any lands, water courses, railroads or public or private ways, and along any such way in such manner as not unnecessarily to obstruct the same; and for the purpose of constructing, maintaining and repairing such conduits, pipes and other works, and for all proper purposes of this act, said city may dig up any such lands, and, under the direction of the board of selectmen of the town in which any such ways are situated, may enter upon and dig up any such ways in such manner as to cause the least hindrance to public travel thereon.

Sect. 3. The city shall, within sixty days after the taking of any lands, rights of way, water rights, water sources, or easements as aforesaid, otherwise than by purchase, file and cause to be recorded in the registry of deeds, for the county within which the same are situated, a description thereof sufficiently accurate for identification,

with a statement of the purpose for which the same were taken, signed by the water commissioners hereinafter provided for.

SECT. 4. The city shall pay all damages sustained by any person or corporation in property by the taking of any land, right of way, water, water source, water right or easement, or by any other thing done by said city under the authority of this act. Any person or corporation sustaining damages as aforesaid under this act, who fails to agree with said city as to the amount of damages sustained, may have the damages assessed and determined in the manner provided by law when land is taken for the laying out of highways, on application at any time within the period of three years from the taking of such land or other property, or in the doing of other injury, under the authority of this act, but no such application shall be made after the expiration of said three years. No application for assessment of damages shall be made for the taking of any water, water right, or for any injury thereto, until the water is actually withdrawn or diverted by said city under the authority of this act.

109 SECT. 5. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip to an amount not exceeding in the aggregate four hundred thousand dollars; such bonds, notes or scrip shall bear on their face the words "Newburyport water loan," shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest payable semi-annually at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and be countersigned by the water commissioners hereinafter provided for. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper, *provided*, that such securities shall not be sold for less than par value thereof. The city shall provide, at the time of contracting said loan, for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of said loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan and shall be used for no other purpose.

SECT. 6. The said city, instead of establishing a sinking fund, may, at the time of authorizing said loan, provide for the payment thereof in such annual proportionate payments as will extinguish the same within the time prescribed in this act; and when such vote has been passed the amount required thereby shall, without further vote, be assessed by the assessors of said city in each year thereafter, until the debt incurred by said loan shall be extinguished in the same manner as other taxes are assessed, under the provisions of section 34 of chapter 11 of the Public Statutes.

SECT. 7. The return required by section 91 of chapter 11 of the Public Statutes shall state the amount of any sinking fund established under this act, and if none is established, whether action has been taken in accordance with the provisions of the preceding sec-

tion, and the amounts raised and applied thereunder for the current year.

SECT. 8. The said city shall raise annually by taxation a sum which, with the income derived from the water rates, will be
110 sufficient to pay the current annual expenses of operating its water works, and the interest as it accrues on the bonds, notes and scrip issued as aforesaid by said city, and to make such contributions to the sinking fund and payments on the principal as may be required under the provisions of this act.

SECT. 9. Whoever wilfully or wantonly corrupts, pollutes or diverts any of the waters taken or held under this act, or injures any structure, work or other property owned, held or used by said city under the authority and for the purpose of this act, shall forfeit and pay to said city three times the amount of damages assessed therefor, to be recovered in an action of tort; and upon conviction of either of the above wilful or wanton acts shall be punished by a fine not exceeding three hundred dollars, or by imprisonment not exceeding one year.

SECT. 10. The powers and duties granted to and imposed upon the City of Newburyport by this act shall be exercised by a board of water commissioners, consisting of five residents of the city, to be appointed by the mayor with the approval of the city council. Said commissioners shall be appointed and hold their office from the time of their appointment and approval, for the terms of one, two, three, four and five years, respectively, from the first Monday of May next following their appointment; and thereafter one commissioner shall be appointed each year for the term of five years from the first Monday of May. All such commissioners, except in a case of removal, shall hold office until their successors are appointed in their stead. Vacancies occurring during the term may be filled for the remainder of the term. No person shall be appointed commissioner who holds, at the time, any city office by popular election. Any commissioner, after due notice and hearing, may be removed at any time by a two-thirds vote of each branch of the city council, for any cause which shall be deemed sufficient, and shall be expressed in the vote of removal. The commissioners shall receive no compensation for their services unless the city council, by a two-thirds vote of each branch thereof, otherwise determine, and in such case the amount of compensation may be fixed by a like two-thirds vote.

SECT. 11. The water commissioners shall fix such prices or rents for the use of water as shall produce annually, as near as may
111 be, a net surplus equal to two per centum of the total amount of the bonds, notes and scrip issued under this act, after paying all current expenses of operating the water works and interest upon loans, and after the payment of all expenses for new construction not exceeding ten thousand dollars in any one year. The commissioners of sinking funds of the city of Newburyport shall be trustees of a sinking fund which shall be set apart for the payment and redemption of said water loan, and which shall remain inviolate and pledged to the payment of said loan and shall be used for no

other purpose. The net surplus aforesaid shall be paid into the sinking fund, and if said surplus does not equal two per centum of the total amount of the bonds, notes and scrip issued under this act, the city shall raise by general taxation a sum which with the surplus shall equal said two per centum, and shall contribute said sum to the sinking fund. The commissioners shall annually, and as often as the city council may require, render an account of all their doings in relation to the sinking fund, and shall be governed by the provisions of section eleven of chapter twenty-nine of the Public Statutes, except as herein otherwise provided.

SECT. 12. At any time within sixty days after the passage of this act, and not after sixty, the Newburyport Water Company may notify the mayor of Newburyport in writing that it desires to sell to said city its corporate property and all the rights and privileges of said company, and execute and deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid; *provided, however*, the legal voters of the city of Newburyport, at legal meetings to be called in the several wards of said city within six months after said notification has been received as aforesaid, shall, by a majority vote of the voters of said city present and voting thereon at such meetings, vote to purchase the aforesaid property upon the terms and conditions contained in this section, whereupon the property thus conveyed shall become the property of the city of Newburyport, and said city shall be liable to pay to said company the fair value of the property thus conveyed; and in case the said city and the said company shall be unable to agree upon the value of said property, the supreme judicial court may, upon application of either party and notice to the other, appoint three com-
112 missioners, one of whom shall be a skilled engineer, and one learned in the law, who shall determine the fair value of said property conveyed as aforesaid, and whose award, when accepted by the court, shall be final.

SECT. 13. After the vote provided for in section twelve of this act, or provided the Newburyport Water Company does not so notify the said mayor within said sixty days, this act shall be submitted to the legal voters of the city of Newburyport for their acceptance or rejection, at legal meetings to be called in the several wards of said city within eight months from the passage of this act, and shall take effect from and after its acceptance by a two-thirds vote of the voters of said city present and voting thereon at such meetings. The vote shall be by separate ballot, and the ballot shall be Yes or No, in answer to the question, "Shall the City of Newburyport accept chapter — of the Acts of Eighteen hundred and ninety-three, authorizing the City of Newburyport to establish and maintain a system of water supply for domestic and other uses?" This act shall be void if not accepted by said vote.

Approved June 10, 1893.

Exhibit F.

To the honorable senate and house of representatives of the Commonwealth of Massachusetts, in general court assembled:

The undersigned petitioner, The Newburyport Water Company, respectfully represents:

That it is a corporation duly established by virtue of the provisions of chapter 235 of the Acts of the Year 1880; that the City of Newburyport has voted to accept the provisions of chapter 471 of the Acts of the Year 1893, and, by virtue of the authority conferred upon it by said act, to establish independent works to supply water to itself and its inhabitants, and not to purchase the property and privileges of your petitioner as it was authorized to do by said act. And your petitioner says that if said city proceeds to establish such independent supply, the property and franchise of your petitioner will be greatly injured in value and may be rendered sub-
113 stantially worthless; and that your petitioner's plant and property was obtained for the express purpose of furnishing such supply of water, and is well adapted and has been thus far used therefor.

And your petitioner further represents that there is doubt whether the provisions of chapter 471 of the Act of the Year 1893 are adequate to enable your petitioner to obtain compensation for the injury which may be done to your petitioner by said city.

Wherefore your petitioner prays for the passage of an act providing and requiring that said city shall, before proceeding to supply water to itself or its inhabitants under the authority of said chapter 471, purchase the franchise, property and all the rights and privileges of your petitioner, and that your petitioner be authorized to make sale thereof; or that in some other suitable way your petitioner may be compensated for said threatened damage by said city.

THE NEWBURYPORT WATER COMPANY,
By JOHN E. McCUSKER, *Sup't.*

Exhibit G.

An act to provide for the purchase of the property of the Newburyport Water Company by the City of Newburyport.

Be it enacted, etc., as follows:

Sect. 1. The City of Newburyport shall, before proceeding to supply water to itself or its inhabitants under the authority of chapter four hundred and seventy-one of the Acts of the Year One thousand eight hundred and ninety-three, purchase from the Newburyport Water Company the franchise, corporate property, and all the rights

and privileges of said Newburyport Water Company, and said Newburyport Water Company is authorized to make sale of the same to said city. The compensation to be paid by said city to said company shall be determined by three commissioners to be appointed by the supreme judicial court, upon application of either party and notice to the other, whose award, when accepted by said court, shall be binding upon all parties.

SECT. 2. Upon petition by said Newburyport Water Company, the supreme judicial court shall have jurisdiction in equity, if said city shall proceed to supply itself or its inhabitants with water 114 before making the purchase aforesaid, to enjoin said city from so doing until it shall have made said purchase, and to compel it to make said purchase.

EXHIBIT H.

Acts and Resolves Passed by the General Court of Massachusetts for the Year 1894.

Chapter 474.

An act to provide for the purchase of the property of the Newburyport Water Company by the City of Newburyport.

Be it enacted, etc., as follows:

SECT. 1. If, within thirty days after the passage of this act, the Newburyport Water Company shall notify the mayor of the city of Newburyport, in writing, that it desires to sell to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants under the authority of chapter four hundred and seventy-one of the Acts of the Year Eighteen hundred and ninety-three, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same. Whenever said city shall, by a majority vote of the legal voters of said city present and voting thereon at a meeting called for that purpose, vote to purchase said property, notice of the desire of said company to sell the same having been given as hereinbefore provided, said company shall, within twenty days after the vote aforesaid, execute and deliver to said city proper deeds and instruments in writing, conveying to said city the property aforesaid, and said property thus conveyed shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided. If at the first meeting a majority of the voters present and voting do not vote to purchase said property, other

meetings may be called and held therefor. In case the said city
115 and the said company shall be unable to agree upon the value of said property, the supreme judicial court shall, upon application of either party and notice to the other, appoint three commissioners, two of whom shall be skilled engineers and the third learned in the law, who shall determine the fair value of said property for the purposes of its use by said city, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company.

SECT. 2. In case said Newburyport Water Company shall convey its property to the City of Newburyport, in accordance with the provisions of the preceding section, said city shall manage and use the property thus conveyed for the purposes and under the provisions of chapter four hundred and seventy-one of the Acts of the Year Eighteen hundred and ninety-three.

SECT. 3. The said city may, for the purpose of paying the necessary expenses and liabilities incurred under the provisions of this act, issue from time to time bonds, notes or scrip to an amount sufficient for such purpose; such bonds, notes or scrip shall bear on their face the words, "Newburyport water loan," shall be payable at the expiration of periods not exceeding thirty years from the date of issue, shall bear interest payable semi-annually at a rate not exceeding six per centum per annum, and shall be signed by the treasurer of the city and countersigned by the water commissioners provided for by chapter four hundred and seventy-one of the Acts of the Year Eighteen hundred and ninety-three. The said city may sell such securities at public or private sale, or pledge the same for money borrowed for the purposes of this act, upon such terms and conditions as it may deem proper, provided that such securities shall not be sold for less than the par value thereof. The city shall provide at the time of contracting said loan for the establishment of a sinking fund, and shall annually contribute to such fund a sum sufficient with the accumulations thereof to pay the principal of such loan at maturity. The said sinking fund shall remain inviolate and pledged to the payment of said loan, and shall be used for no other purpose.

SECT. 4. In case said city shall, in violation of section 1 of this act, proceed to supply itself or its inhabitants with water be-
116 fore making the purchase aforesaid, the supreme judicial court shall, upon petition of said company, have jurisdiction in equity to enjoin said city from so doing until it shall have made such purchase.

SECT. 5. This act shall take effect upon its passage.

Approved June 14, 1894.

117 *Stipulation.*

(Filed June 10, 1899.)

1. It is hereby stipulated and agreed, subject, however, to all objections by either party as to competency, materiality and relevancy, as follows:

(*a.*) That prior to the enactment of chapter 235 of the Acts and Resolves passed by the general court of Massachusetts in the year 1880, said general court passed an act or acts authorizing the defendant city to take and supply water, provided the act be accepted by a vote of the inhabitants, and that such vote was taken, and resulted in a failure to accept such act.

(*b.*) That the said act of 1880 was duly accepted by the incorporators named therein.

(*c.*) That on or about November 30, 1892, the mayor of said city, pursuant to an order by the city council of said city, presented to said general court the petition, a copy of which is set forth in paragraph 7 of the bill.

That at that time and theretofore, the plaintiff company was without municipal or other competition in supplying and distributing water to the inhabitants of said city.

That in said general court said petition was referred to the committee on water supply; that hearings were held by said committee; that said company opposed said petition, and opposed the passage of any act authorizing said city to compete with said company in furnishing water as aforesaid; that as a result of said petition and said opposition said general court enacted chapter 471 of Acts and Resolves passed by the general court of Massachusetts in the year 1893; that as a result of said opposition by said company the provisions of sections 12 and 13 of said act were added to the provisions petitioned for as aforesaid by said city.

(*d.*) That in the spring of 1889, the plaintiff company laid a pipe from its works to the Merrimac river, which it was not authorized by law to use as a source of water supply; that the town of Amesbury, having about 10,000 inhabitants, discharged its sewage into this river about 1½ miles *about* Newburyport, as did also the city of
118 Haverhill, of 27,000 inhabitants, 12 miles above, the city of Lawrence, of 44,000 inhabitants, 19 miles above, and the city of Lowell, of 77,000 inhabitants, about 24 miles above; that the cities of Lawrence and Lowell used the water of Merrimac river for purposes of domestic supply without filtration; that in June, 1892, the company without notice to the city, or its other customers, but with the knowledge of some of its customers, began to pump water from the river into its supply furnished the city and continued so to do at intervals, in varying quantities, pumping sometimes from the river from 155,000 to 225,000 gallons daily in a total consumption of from 500,000 to 600,000 gallons; that by a letter of

Nov. 3, 1892, the State board of health cautioned the company against the use of the Merrimac River water, and that but very little was pumped thereafter; that the board had previously disapproved the river as a source of domestic water supply, unless the water therefrom was filtered; that the company wholly discontinued the use of Merrimac river, in March, 1893; that some sickness in the city during the winter of 1892–'93 was attributed by some physicians and by the State board of health to this use of the Merrimac River water; that the foregoing facts were put in evidence, or were admitted by the company, before the legislative committee to which such petition was referred, and which reported to the legislature adversely to the petition of the City of Newburyport for an act authorizing it to establish an independent water supply, but that the legislature subsequently, at the same session, June 10, 1893, enacted chapter 471 of the Acts of 1893, annexed as Exhibit E to the plaintiff's bill.

(*e.*) That upon the vote upon the acceptance of the act of 1893, alleged in paragraph 8 of plaintiff's bill (Record, p. 6), and thereafter it was claimed by counsel for the defendant that chapter 471 of the Massachusetts Acts of 1893 was thereby duly accepted and had become effective, and that defendant had the right thereunder to supply said city and its inhabitants with water, and to receive revenue therefor; and defendant was so advised.

That thereupon, the water company presented to the legislature, prior to its session of 1894, the petition marked "Exhibit F," annexed to plaintiff's bill (Record, p. 40); that with said petition said company presented a form of bill entitled "An act to provide
for the purchase of property of the Newburyport Water Com-
119 pany by the city of Newburyport," a copy whereof marked "Exhibit G" is annexed to plaintiff's bill (Record, p. 41); that said petition was referred to the committee on water supply; that said committee held hearings upon said petition, and that at such hearings both plaintiff and defendant herein were represented; that, as the result of said petition by plaintiff, and the opposition thereto of defendant before said committee, chapter 474 of the Acts of 1894 was passed, a copy of which, marked "Exhibit H," is annexed to plaintiff's bill (Record, p. 41).

(*f.*) That after the enactment of Statute 1893, chapter 471, and before the enactment of Statute 1894, chapter 474, the city of Newburyport, claiming to act under authority of statute of 1893, employed an engineer to make some surveys, which involved expenses of about $1500, in reference to the establishment of an independent water supply. After the transfer of the company's plant to the city, and before the filing of this bill, the city expended not less than $32,340 in repairs and improvements of the property, and $16,285 in additions to it, and received the revenues from the property on the basis of the old rates.

(*g.*) That at the hearing before the legislative committee in March, 1894, the mayor of Newburyport made the statements contained in e affidavit of Thomas E. Major, on file in this case, and a copy of

which is annexed hereto, and further statements in answer to questions immediately following those in the affidavit, as follows:

"Q. That is what you want this committee to approve? A. No, sir. We want them to leave us as we were last year. Q. Your idea is that it will result in the ruin of the company? A. I don't think the company can run in competition with the city in supplying water to the citizens of Newburyport. Q. That means the loss of the entire capital of the company? A. I don't think they will lose anything, especially the old stockholders."

2. That the stockholders of the plaintiff company voted to offer, sell and convey the company's property to the defendant city, as set forth in paragraph 9 of the bill, because of their belief that the city of Newburyport was liable to compete with the water company, and because they believed that such competition would ruin the company.

120 (*a.*) That the vote, called a vote of the board of aldermen, stated at the foot of page 10 of the printed bill, was in fact a joint vote of the city council, and that said vote was communicated to the water company.

(*b.*) That the vote of the city, stated at the foot of page 9 of the printed bill, was in fact in the form stated in defendant's answer upon page 83 of the printed record.

(*c.*) That either party may refer to any part of the report of the commissioners appointed by the supreme judicial court to estimate the value of the property of the water company.

(*d.*) That the company notified the city, under the statute of 1893, section 12 and within the sixty days therein limited of its desire to sell to the city its property therein described.

(*e.*) That the petition for rehearing, set out on page 16 of the bill, was dismissed before the argument on the demurrer in this case.

3. This stipulation shall not prevent either party from offering further and other evidence under the pleadings, and is not intended to exclude any matters of which the court may take judicial notice.

ROBERT M. MORSE,
L. L. SCAIFE, *For Plaintiff.*
A. E. PILLSBURY,
For Defendant.

Agreement as to Withdrawal of Exceptions to Answer, etc.

(Filed June 15, 1899.)

It is hereby agreed,

(*a.*) That plaintiff's exceptions to defendant's answer may be withdrawn without costs;

(*b.*) That plaintiff's replication may be filed on or before June 20, 1899.

ROBERT M. MORSE,
L. L. SCAIFE, *For Plaintiff*
A. E. PILLSBURY,
For Defendant.

121 *Replication.*

(Filed June 15, 1899.)

This repliant, the plaintiff, saving and reserving to itself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendant, for replication thereunto says, that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, untrue, evasive and insufficient in law to be replied unto by this repliant; without this, that any other matter or thing in said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

LAURISTON L. SCAIFE,
Solicitor for Plaintiff.

Order of Court.

(June 20, 1899.)

COLT, *J.*:

In view of the following suggestion by the court in its rescript upon defendant's motion for leave to file special demurrer, to wit,

"The order of trial is within the control of the court. It can direct the constitutional question to be first heard. If the determination of that question is in defendant's favor the complainant can proceed no further. If the result is in complainant's favor the relief sought by the seventh prayer would still come up under defendant's answer,"

the parties to the above-named suit hereby consent that the following order may be made:

Ordered: That the constitutional question, to wit, whether or not the plaintiff has been deprived of its property without due
122 process of law in violation of the fourteenth amendment of the Constitution of the United States, be first heard; and that all questions as to plaintiff's relief, if any (including questions of valuation of the property alleged to have been taken), await the determination of the constitutional question.

By the court:

BENJ. H. BRADLEE,
Deputy Clerk.

ROBERT M. MORSE,
L. L. SCAIFE,
For Plaintiff.
A. E. PILLSBURY,
For Defendant.

Agreement as to Statement of Counsel to Commissioners.

(Filed June 22, 1899.)

It is hereby agreed, subject to objection by the defendant as to competency, materiality and relevancy, that, in the opening on behalf of the water company before the commissioners appointed by the State court under the act of 1894, counsel for the water company said to the commissioners as follows:

"The act of 1880, incorporating the company, gave the City of Newburyport the right, at any time after ten years from the completion of the works, to purchase the corporate property, rights and privileges of the company; and although the city has acquired the property by force of the act of 1894, we claim that we are entitled to the full compensation provided for in the act of 1880; and farther, that, if the effect of the act of 1894 be to take from the company, without compensation, any property or rights acquired by it under its charter, to that extent the act of 1894 is unconstitutional."
(Record of proceedings before commissioners, vol. 1, pages 27, 28.)

L. L. SCAIFE,
For Plaintiff.
A. E. PILLSBURY,
For Defendant.

123 & 124 *Affidavit of Thomas E. Major.*

(Filed July 21, 1897. Affidavit Referred to in Stipulation of June 10, 1899, Page 119.)

I, Thomas E. Major, of Malden, in the county of Middlesex and district of Massachusetts, make oath and say as follows:

That I assisted Rogers and Jones, stenographers, in reporting officially the testimony at the hearings before the legislative committee on water supply of the Massachusetts legislature, March 28, 1894, upon the petition of the Newburyport Water Company; that Orrin J. Gurney, mayor of Newburyport, testified in my presence, upon cross examination by R. M. Morse, Esq., as counsel for said Newburyport Water Company, as follows:

"Q. When you go into competition it would be with the view of ruining the water company?

A. No, sir; but with a view of the protection of the citizens; but I think that will be the natural effect, that the water company will be ruined.

Q. Then the plan you profess to adopt is one which in your expectation will involve the ruin of the company?

A. I do not see any other way for it; I do not think they can compete with the city."

THOMAS E. MAJOR.

Sworn to July 19, 1897.

125 *Stipulation.*

(Filed March 22, 1901.)

It is hereby agreed, if in the opinion of the court the testimony of the commissioners below referred to is competent evidence, is admissible at this stage of the case, and is material, that the commissioners appointed under Mass. St. of 1893, chap. 471, sect. 12, to value the property of the plaintiff company, if called as witnesses in this cause, would testify, without contradiction, that they did not in fact value as part of said property the contract between the company and the city, of which a copy marked "Exhibit D" is annexed to the plaintiff's bill, it being their opinion that the same in law could not be valued; and it is also agreed that the same shall be dealt with in like manner as if said commissioners had so testified before the commissioner appointed by the court in this case, and as if said objections as to competency, materiality, and admissibility at this stage of the case had been duly taken before such commissioner and reserved for the consideration of the court; and it is also agreed that the petitioner at the hearing put the contract in evidence under objection; and that the commissioners viewed and examined the plant, two of them being engineers; and that evidence was submitted bearing upon the cost to the company of furnishing water, but no evidence of the quantity of water supplied to the city under the contract, nor any direct evidence of the cost of performing the contract or of its value to the company; that respondent's counsel in his closing argument asked petitioner's counsel if he waived the claim to have the contract valued, and the latter replied that he did not waive it and was not prepared to say what use he should make of it; that thereupon respondent's counsel proceeded to argue that the contract should not be valued; that the petitioner's counsel in his closing argument mentioned the contract as one of the items of property which the company had parted with to the city, and urged, but not in this connection, that it was the duty of the commissioners to estimate the value of all the property of the company as one whole; and that in the proceedings in the State court upon
126 the report of the commissioners the company made no claim that the contract should be or had not been valued, and raised no question concerning it.

It is further agreed that all questions of relief shall await final determination of the question whether the plaintiff is entitled to any relief, unless the circuit court shall hold the evidence above recited to be admissible and material, and in view thereof shall decree that the plaintiff is entitled to relief, notwithstanding the decision rendered August 8, 1900.

NEWBURYPORT WATER CO.,
By ROBERT M. MORSE, *Its Attorney.*
A. E. PILLSBURY,
For the City of Newburyport.

127 *Transcript of Record of Circuit Court.*

UNITED STATES OF AMERICA, }
District of Massachusetts, } ss:

At a circuit court of the United States for the first circuit begun and holden at Boston within and for the district of Massachusetts, on Tuesday, the fifteenth day of October in the year of our Lord one thousand nine hundred and one. Before the Honorable Le Baron B. Colt, circuit judge.

NEWBURYPORT WATER COMPANY, Complainant,
v.
CITY OF NEWBURYPORT, Defendant. } No. 924. Equity.

The bill of complaint in this cause was filed in the clerk's office on the twenty first day of July, A. D. 1897, and was duly entered at the May term of this court, A. D. 1897, and is in the words and figures following:

128 *Bill of Complaint.*

(Filed July 21, 1897.)

(MEMORANDUM.—The bill of complaint, as printed in this transcript of record, commencing on page 1, is here inserted. Alex. H. Trowbridge, clerk.)

At the same term the following amendment to bill was filed:

Amendment to Bill.

(Filed Sept. 1, 1897.)

(MEMORANDUM.—The amendment to bill, as printed in this transcript of record, commencing on page 73, is here inserted. Alex. H. Trowbridge, clerk.)

Also at the same term the following motion to dismiss bill for want of jurisdiction was filed:

Motion to Dismiss Bill for Want of Jurisdiction.

(Filed Sept. 9, 1897.)

The City of Newburyport, the respondent, appearing specially in the above entitled cause, and only for the purpose of objecting to the jurisdiction, moves that the complainant's bill be dismissed, on

the ground that it appears upon the face thereof that the court has no jurisdiction to entertain the same, or to administer any relief thereon.

And said respondent further moves that the hearing of the complainant's application for preliminary injunction, and all other proceedings in the cause, be stayed or suspended to await the hearing and determination of the foregoing motion to dismiss the bill.

A. E. PILLSBURY,
Solicitor and of Counsel for the Respondent,
The City of Newburyport.

129 On the thirteenth day of September, A. D. 1897, the foregoing motion to dismiss bill for want of jurisdiction was heard and denied by the court, the Honorable Le Baron B. Colt, circuit judge, sitting.

On the twenty seventh day of September, A. D. 1897, the following demurrer was filed:

Demurrer.

(Filed Sept. 27, 1897.)

(MEMORANDUM.—The demurrer, as printed in this transcript of record, commencing on page 75, is here inserted. Alex. H. Trowbridge, clerk.)

This cause was thence continued to the October term, A. D. 1897, when the same came on to be heard and was fully heard by the court, on demurrer, the Honorable Le Baron B. Colt, circuit judge, sitting, on the twenty third, twenty fifth and thirtieth days of October, 1897.

On the twenty fourth day of February, A. D. 1898, an opinion of the court was announced, overruling said demurrer.

At the said October term, A. D. 1897, the following claim of appeal was filed:

Claim of Appeal.

(Filed March 22, 1898.)

In the above entitled cause, the respondent, The City of Newburyport, appeals from the judgment and decree overruling its demurrer to the complainant's bill.

A. E. PILLSBURY,
C. C. DAME,
R. E. BURKE,
Solicitors and of Counsel for the Respondent.

130 Also at the same term the following petition for rehearing on demurrer was filed:

Petition for Rehearing on Demurrer.

(Filed April 14, 1898.)

To the honorable the judges of the circuit court of the United States in said district:

The City of Newburyport, the defendant in said cause, respectfully applies for a rehearing of its demurrer filed to the plaintiff's bill, for the following cause:—It appears from the opinion of the court upon the demurrer that in the original hearing thereon the defendant so far failed to make its position clear to the court that the court has overlooked and omitted to consider the propositions upon which the defendant principally relied in support of the demurrer, and the authorities, most of them binding upon this court, cited in the defendant's brief in support thereof, especially in the following particulars:

1. The defendant took and relied upon the position that the plaintiff, in view of its proceedings under the Massachusetts act of 1894 as set out in the bill, must be held to have waived any objection to the constitutionality or validity of said act, and to be now estopped to question the same. This position is supported by the authorities, many of them binding upon this court, cited on pages 15, 16, 17 and 30 of the defendant's printed brief filed at the hearing. This argument and these authorities are not alluded to in the opinion of the court, and do not appear to have been considered.

2. The court in its opinion dismisses the defendant's objection that the present bill is an attempt to review and retry a case already tried and determined in the State court by saying:—"The answer to this is that the constitutional questions set out in this bill were not raised in the State court, and could not have been drawn
131 in question in that suit," and therefore, that "the objection that the complainant should have raised the question in that suit fails to the ground and constitutes no defence to the present bill." The essence of all the constitutional questions raised in this bill is in the averment that to compel the plaintiff to part with its property at a price ascertained in accordance with the valuation clauses of section 1 of the act of 1894 constitutes in effect a taking of property without just compensation, in violation of the Federal Constitution. Upon the face of the bill the only unconstitutionality, if any, lies in the valuation clauses of the act of 1894. That there was a taking of property presents no Federal question. The only Federal question is in the averment of a taking without just compensation, and the only Federal question, if any, arises out of the alleged failure of compensation, which concerns alone the valuation clauses of the act of 1894. It is plain beyond question that the constitutionality of these valuation clauses could have been raised in the plaintiff's proceedings in the State court, by asking for such

construction as the plaintiff desired to be put upon them, and claiming that any different construction would be in violation of the Constitution of the United States; and that a final determination of all these questions could have been obtained in that proceeding by writ of error to the Supreme Court of the United States. In taking the position announced in the opinion, the court appears to have overlooked this fact and argument. The Massachusetts cases cited by the court are different from the present case in this particular, and furnish no authority for the position that the valuation clauses of the act of 1894 could not have been questioned in the plaintiff's proceedings in the State court.

3. Upon the question of laches appearing upon the face of the bill, relied on as a defence thereto, the court assigns as its reason for overruling the demurrer that "the bill was brought before the suit in the State court was finally determined and before the acceptance by the complainant of the award."

132 The defendant did not urge or rely upon any laches after the proceedings in the State court and before the bringing of this bill. It relied and still relies on the plaintiff's laches throughout the proceedings in the State court and during the entire period of two years preceding the bringing of the bill. It is plain that the question of the validity of the Massachusetts act of 1893 could have been raised by the plaintiff, by original proceeding in the State court, or in this court if it can now be raised here, prior to the passage of the act of 1894. It is equally plain that all the questions raised in the present bill, of the validity of the act of 1894 or of the act of 1893, could have been raised by the plaintiff by original bill in this court, if they can now be raised here, at any time after the passage of the act of 1894, and before the plaintiff began its proceedings in the State court. It is equally plain that all questions of the constitutionality or validity of the valuation clause of section 1 of the act of 1894, which is the only part of the act complained of or involving any Federal question, could have been raised and availed of by the plaintiff in the proceedings which it actually brought in the State court, and a final adjudication of the Supreme Court of the United States obtained thereon in that proceeding. The laches relied on by the defendant is in omitting to raise any constitutional question throughout the whole course of that proceeding, and throughout the period of two years which it occupied, either in that or in this court, until that proceeding was terminated by an award of an amount unsatisfactory to the plaintiff. This position is supported by the authorities, many of them binding upon this court, cited on pages 5, 6, 7, 9 and 14 of the defendant's brief, and by Forsyth *v.* Hammond, 166 U. S. 506, none of which are alluded to in

133 the opinion of the court or appear to have been considered.

4. The court assumes in its opinion that the plaintiff's conveyance of its property was involuntary and compulsory, because it is so alleged in the bill. The facts bearing upon this question are fully set out in the bill, and they do not support but are inconsistent with this allegation. The defendant is not concluded by the

allegation if the facts set out do not support it or are inconsistent with it. This position is supported by the authorities, many of them binding upon this court, cited on pages 19, 20 and 35 of the defendant's brief, which are not alluded to in the opinion and do not appear to have been considered.

5. The facts disclosed in the bill show that the plaintiff's conveyance cannot in law be deemed to have been involuntary or compulsory, and that it was not made under any circumstances amounting to legal compulsion or duress. This position is supported by the authorities cited on pages 27 and 28 of the defendant's brief, to which argument or authorities no allusion is made in the opinion, and they do not appear to have been considered.

6. It is clear that duress or compulsion, if shown, while it may give the plaintiff a right in equity to avoid its deed, does not necessarily amount to a taking of its property without just compensation, or to any other violation of the Federal Constitution or any Federal right of the plaintiff, nor give this court jurisdiction of the bill. This position of the defendant is not alluded to in the opinion and does not appear to have been considered.

7. The essence of the plaintiff's bill, as the court assumes in its opinion, is in the averment of a taking of its property without just compensation. Whether there was a taking of its property is a question and conclusion of law. The assertion of a taking is not enough, and the defendant is not bound by it. This position is supported by the authorities, many of them binding upon
134 this court, cited on pages 19, 20 and 35 of the defendant's brief, to which authorities or argument no allusion is made in the opinion, and they do not appear to have been considered.

8. The facts disclosed in the bill show that there was no taking in law of any part of the plaintiff's property, and nothing which can be held in law to amount to a taking of its property; still less to a taking of its property without just compensation, or any other violation of the Federal Constitution. This position is supported by the authorities, many of them binding upon this court, cited on pages 21, 23, 24, 25 and 26 of the defendant's brief. The opinion makes no allusion to this argument or to these authorities, and they do not appear to have been considered.

9. It is clear from the bill, and the court assumes in its opinion, that the only taking of the plaintiff's property without compensation, if there was any taking, was of its franchise rights. It is within the power of the legislature of Massachusetts to wholly repeal all franchise rights of the plaintiff at its pleasure without making or providing compensation therefor. It must therefore be still more within its power to provide for a voluntary sale of the plaintiff's property at a price which should not be enhanced by or on account of its franchise rights. This position is supported by the authorities, many of them binding upon this court, cited on pages 20, 23, 24, 25 and 37 of the defendant's brief. The opinion of the court makes no allusion to this argument or to these authorities, and they do not appear to have been considered.

10. It is clear upon the face of the bill that no franchise rights of the plaintiff passed to the defendant under the act of 1894, or the proceedings set out in the bill, as the act of 1894 neither required nor authorized such transfer of its franchise rights by the
135 plaintiff, nor their purchase by the defendant. It is clear that the form of the defendant's deed in this respect could not enlarge the statute or vary its effect. It is clear that the defendant city holds its franchise rights to supply water and take rates therefor, by direct grant from the legislature under the acts of 1893 and 1894, as the supreme court of Massachusetts has held which decision concludes this court upon this question. It is therefore clear that the defendant has acquired by the proceedings no franchise rights of the plaintiff, and cannot therefore be under obligation to make compensation for any such rights. So far as appears by the opinion, the court seems to have overlooked this fact and argument, especially as set out on pages 33, 37, 38 and 40–44 in the defendant's brief.

11. The court in its opinion says: "The bill further avers that the action of the water commissioners under the act of 1894 resulted in the deed of January 29, 1895, and that such conveyance by the water company was voluntary in name and form only" etc. The defendant does not understand this passage of the opinion, as no action of any water commissioners under the act of 1894 is alleged in the bill, and as all the action of the valuation commissioners appointed under the act of 1894 was after the deed of January 29, 1895, and therefore could not have resulted in that deed, and therefore it cannot be the action of these commissioners which is thus referred to by the court. As the defendant is unable to understand what is thus referred to, and is unaware what bearing this may have had upon the decision, it feels the need of further opportunity to inquire into this point.

The defendant is advised and believes that these positions, several of them separately, constitute a full defence to the plaintiff's
136 bill, and that all the facts necessary to make them fully available to the defendant are set out in the bill and are before the court on the demurrer, and that it has a legal right to the full benefit of all of them at this stage of the case. The authorities cited on pages 19 and 20 of the defendant's brief, many of them binding upon this court, support this position. So far as appears by its opinion, the court does not seem to have considered either of these positions or the authorities cited in support of them, with a single exception, upon the question of laches, upon which the opinion seems to attribute to the defendant a position which it is not aware of having taken, and omits to notice the position which it did take or the authorities cited in support of it. The trial of the facts set out in this bill will put the defendant to great vexation, delay and expense, for which, as the defendant is advised, the bill furnishes no sufficient ground or justification, and to which the defendant ought not to be subjected without a full hearing and full consideration of all arguments and authorities tending to support the demurrer. For these reasons the defendant respectfully applies for

a rehearing thereon, to the end that its defences to the bill, as they appear upon the demurrer, and the authorities in support thereof, may be fully heard and considered by the court.

CITY OF NEWBURYPORT,
By GEORGE H. PLUMER, *Mayor*.

A. E. PILLSBURY,
C. C. DAME,
R. E. BURKE,
Of Counsel.
HORACE I. BARTLETT,
City Solicitor.

137 DISTRICT OF MASSACHUSETTS, *April 13th*, 1898.

Personally appeared said George H. Plumer who subscribed the foregoing petition in behalf of the City of Newburyport, and made oath in behalf of said city that the same is true according to the best of his knowledge, information and belief.

Before me,

GRANT M. PALMER,
[SEAL.] *Notary Public.*

Also at the same term the following answer was filed by consent:

Answer.

(Filed by consent April 14, 1898.)

(MEMORANDUM.—The answer, as printed in this transcript of record, commencing on page 79, is here inserted. Alex. H. Trowbridge, clerk.)

Also at the same term the following complainant's exceptions to defendant's answer were filed by consent:

Complainant's Exceptions to Defendant's Answer.

(Filed by consent May 9, 1898.)

(MEMORANDUM.—The complainant's exceptions to defendant's answer, as printed in this transcript of record, commencing on page 96, are here inserted. Alex. H. Trowbridge, clerk.)

This cause was thence continued from term to term to the October term, A. D. 1898, when the petition for rehearing was heard and denied by the court, the Honorable Le Baron B. Colt, circuit judge, sitting.

138 At the same term the following special demurrer was received:

Special Demurrer, Nov. 17, 1898.

The defendant, The City of Newburyport, not waiving any rights under its general demurrer heretofore filed, but reserving and insisting upon its rights thereunder and under its appeal from the decision of the court thereon, so far as it may lawfully do, and without admitting the jurisdiction of the court, demurs specially to the seventh prayer for relief in the plaintiff's bill, praying that this court ascertain, declare and decree payment of the compensation to be paid the plaintiff for its property acquired by the defendant as set forth in the bill, and demurs specially to the bill in so far as it seeks or sets forth, or purports to set forth or show, any right or claim to the relief sought by said seventh prayer, (no particular part of said bill being directed solely or specifically to, or in support of, said claim, and it being impracticable to further point out or separate by paragraphs or pages any particular part or parts of the bill to which this demurrer especially applies, except said seventh prayer for relief), upon the following ground, namely:

It appears by the bill that the defendant city came into possession of such property of the plaintiff described in the bill as it has ever acquired possession of, by vote of its inhabitants to purchase the same under and in accordance with a vote of the plaintiff corporation to sell the same to the defendant, as set forth on pages 9 and 10 of the printed bill, and under and agreeably to the Massachusetts statute of 1894, of which a copy called "Exhibit H" is annexed
139 to the bill; that it appears by the bill and by the terms of the statute therein set forth that said vote of the inhabitants of the defendant city was a vote to purchase said property for and in consideration of the fair value thereof to be ascertained as provided in said statute; that the method of ascertaining such value, which by the terms of the statute was to constitute the purchase price of said property, was by agreement of the parties or in default thereof by determination of its value by three commissioners appointed by the supreme judicial court of Massachusetts, under and according to the rule of valuation prescribed by said statute; that it appears by the bill (paragraph 11) that the parties were unable to agree upon the price to be paid for the property, and that this left the value thereof, and the price to be paid therefor, to determination by the commissioners, as provided in the statute; and that the plaintiff proceeded for and obtained such determination; that whether such vote of purchase by the inhabitants of the defendant city amounted, as alleged in the bill, to a taking of the plaintiff's property without just compensation in violation of the Federal Constitution, or did not amount to such taking, it appears by the bill that the defendant city has not sought to acquire, and has not acquired, any property of the plaintiff upon any other terms, or at any other value or price, than the terms, price or value prescribed by the statute; that such vote of the inhabitants of the defendant city, in connection with the plaintiff's

offer of sale of its property set forth in the bill, constituted either a purchase or a taking thereof at the value or price ascertained in accordance with the terms of the statute, and at no other value or price whatever; that whether the plaintiff is, as alleged in the bill, entitled to avoid such purchase or the transfer of its property thereunder, or is not entitled to avoid the same, it ap-
140 pears by the bill that the defendant city cannot be held to take title to, or retain the title or possession of, any property of the plaintiff which has or has not come into its possession under said vote, except at the price or value fixed in accordance with the terms of the statute; and that if the defendant city has not acquired such property at such price, it has not acquired it at all; and is not liable, and cannot be held, to pay for it or for any part of it; that the defendant city cannot be required to take, hold or retain any property of the plaintiff at or in consideration of any other price or value, or be bound or be liable to pay for the property acquired from the plaintiff company, or any part thereof, any other value or price than the value or price fixed under and in accordance with the terms of the statute: that this court has no power, authority or jurisdiction to impose upon the defendant city any different obligation or liability to payment for said property than that which was assumed by or resulted from the vote of its inhabitants as set forth, or to assess, ascertain or declare the price or value at which the defendant city shall retain the property of the plaintiff, or any part thereof, or the compensation to be paid the plaintiff by the defendant city therefor; and that any and all inquiry into such price, value or compensation, by or under the authority of this court, will be inconclusive, ineffectual and void.

Wherefore the defendant says that it ought not to be held to farther answer the plaintiff's bill, so far as it seeks or prays assessment or ascertainment of the price or value of or the compensation due the plaintiff for said property, or any part thereof, or an order or decree for payment thereof; and prays that said bill, as to all that part thereof, be dismissed.

A. E. PILLSBURY,
HORACE I. BARTLETT.
City Solicitor,
CHARLES C. DAME,
ROBERT E. BURKE,
Solicitors and of Counsel for the Defendant

141 UNITED STATES OF AMERICA, }
District of Massachusetts. }

NEWBURYPORT, *July* 27, 1898.

I, George H. Plumer, mayor of the city of Newburyport, on oath depose and say in behalf of the respondent that the foregoing demurrer of said city to the bill of complaint in the above entitled cause is not interposed for delay.

GEO. H. PLUMER, *Mayor.*

Subscribed and sworn to by the said George H. Plumer before me,

JOHN T. BROWN,
Notary Public.

[SEAL.]

We hereby certify that in our opinion the foregoing demurrer is well founded in point of law.

A. E. PILLSBURY.
HORACE I. BARTLETT,
City Solicitor.
CHARLES C. DAME.
ROBERT E. BURKE.

On the thirty-first day of December, A. D. 1898, the Honorable Le Baron B. Colt, circuit judge, sitting, an amendment of the seventh prayer of the bill of complaint was allowed in open court, by consent of court and of all parties, by transposing terms "plaintiff," and "defendant" in sixth line of page twenty-one of printed record.

142 On the same day, this cause came on to be heard and was fully heard on motion for leave to file special demurrer, the Honorable Le Baron B. Colt, circuit judge, sitting.

On the seventh day of January, A. D. 1899, the following rescript was filed:

Rescript.

January 7, 1899.

COLT, *J.:*

The filing of a special demurrer at this stage of the case is within the sound discretion of the court.

The demurrer is limited to the seventh prayer of the bill. The prayer is an alternative form, and asks that if the defendant be permitted to retain the property in controversy, the amount of just compensation may be ascertained and ordered paid by the defendant.

The motion is denied for the following reasons:

(1.) The general demurrer, containing seven sub-divisions, was filed September 27, 1897, and overruled February 24, 1898. The motion for leave to file a special demurrer was not made until November 17, 1898. The special demurrer could have been filed with the general demurrer.

(2.) The answer to the bill was filed April 14, 1898, and exceptions to the answer May 9, 1898.

The statement in the answer, "not waiving any rights under its demurrer heretofore filed," plainly refers to the general demurrer already filed, and not the filing of any subsequent special demurrer.

Further, the defendant has included in the twenty-first paragraph of its answer the same claim which is set up in the special demurrer.

(3.) The relief granted can be limited by the decree.

The order of trial is within the control of the court. It can direct

the constitutional question to be first heard. If the determina-
143 tion of that question is in defendant's favor the complainant can proceed no further. If the result is in complainant's favor the relief sought by the seventh prayer would still come up under defendant's answer.

Motion denied.

This cause was thence continued to the May term, A. D. 1899, when the following stipulation was filed:

Stipulation.

(Filed June 10, 1899.)

(MEMORANDUM.—The stipulation, as printed in this transcript of record, commencing on page 117, is here inserted. Alex. H. Trowbridge, clerk.)

At the same term the following replication was filed:

Replication.

(Filed June 15, 1899.)

(MEMORANDUM.—The replication, as printed in this transcript of record, on page 121, is here inserted. Alex. H. Trowbridge, clerk.)

Also at the same term the following agreement as to withdrawal of exceptions to answer, etc., was filed:

Agreement as to Withdrawal of Exceptions to Answer, etc.

(Filed June 15, 1899.)

(MEMORANDUM.—The agreement as to withdrawal of exceptions to answer, etc., as printed in this transcript of record, on page 120, is here inserted. Alex. H. Trowbridge, clerk.)

144 Also at the same term the following order of court was entered:

Order of Court.

June 20, 1899.

(MEMORANDUM.—The order of court, as printed in this transcript of record, commencing on page 121, is here inserted. Alex. H. Trowbridge, clerk.)

Also at the same term the following agreement as to statement of counsel to commissioners was filed:

Agreement as to Statement of Counsel to Commissioners.

(Filed June 22, 1899.)

(MEMORANDUM.—The agreement as to statement of counsel to commissioners, as printed in this transcript of record, on page 122, is here inserted. Alex. H. Trowbridge, clerk.)

Also at the same time, this cause came on to be heard and was fully heard by the court, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Arthur L. Brown, district judge for the district of Rhode Island, duly assigned to hold said circuit court, sitting, pursuant to stipulation and order of court of June 20, 1899.

This cause was thence continued from term to term, under advisement, to the May term, A. D. 1900, when the opinion of the court was announced and a decree ordered to be entered pursuant to said opinion.

This cause was thence continued to the October term, A. D. 1900, when the following stipulation was filed:

145 *Stipulation.*

(Filed March 22, 1901.)

(MEMORANDUM.—The stipulation, as printed in this transcript of record, commencing on page 125, is here inserted. Alex. H. Trowbridge, clerk.)

This cause was thence continued to the May term, A. D. 1901, when the following motion for final decree was filed:

Motion for Final Decree.

(Filed May 22, 1901.)

This cause came on to be further heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is adjudged and decreed that the plaintiff has not been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States; and it is thereupon further ordered, adjudged and decreed that the plaintiff's bill be dismissed, with costs to the defendant to be taxed by the clerk.

The defendant moves for entry of the foregoing decree.

A. E. PILLSBURY,
Solicitor and of Counsel.

At the said May term, A. D. 1901, this cause came on to be heard and was fully heard by the court, on questions raised by stipulation filed March 22, 1901, it being orally agreed that said hearing shall be also a final hearing, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Arthur L. Brown, district judge as aforesaid sitting.

146 This cause was thence continued under advisement to the present October term, A. D. 1901, when the opinion *per curiam* is announced, denying the motion to reopen the case, and granting the motion to enter a final decree dismissing the bill.

On the fifth day of March, A. D. 1902, it is ordered by the court, the Honorable Le Baron B. Colt, circuit judge, and the Honorable Arthur L. Brown, district judge as aforesaid sitting, that the second docket entry of May 22, 1901, be amended so as to read as follows:

"May 22.—Heard before Colt and Brown, JJ. on questions raised by stipulation filed March 22, 1901, it being orally agreed that said hearing shall be also a final hearing in the case."

It is further ordered that the opinion *per curiam* filed January 21, 1902, be amended and the docket entry of that date vacated.

On the fifth day of March, A. D. 1902, an amended opinion *per curiam* is announced and filed.

On the same day the motion for final decree is granted and the following final decree is entered:

Final Decree.

March 5, 1902.

COLT and BROWN, *JJ.:*

This cause came on to be further heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is adjudged and decreed that the plaintiff has not been deprived of its property without due process of law in violation of the

147 fourteenth amendment, and that the obligation of no contract of the plaintiff has been impaired in violation of the contract clause, of the Constitution of the United States; and it is thereupon further ordered, adjudged and decreed that the plaintiff's bill be dismissed, with costs to the defendant to be taxed by the clerk.

By the court:

L. C. TUCKER,
Deputy Clerk.

From the final decree the complainant claims an appeal to the Supreme Court of the United States, and gives good and sufficient security that it will prosecute its appeal to effect and answer all damages and costs if it fail to make its plea good, and said appeal is allowed accordingly.

A true record.

Attest: ALEX. H. TROWBRIDGE, *Clerk.*

148 Circuit Court of the United States, District of Massachusetts.
In Equity.

NEWBURYPORT WATER COMPANY
v.
CITY OF NEWBURYPORT. } No. 924.

Opinion of the Court.

February 24, 1898.

COLT, *J.:*

The present hearing was had on demurrer to the bill of complaint. The principal question raised by the bill is whether the Massachusetts act of 1894 (chapter 474), as construed by the State court, is in violation of the fourteenth amendment of the Constitution of the United States.

That act, as interpreted by the State court, allowed the complainant no compensation for the value of its franchises or on account of its future earning capacity or good-will.

The demurrer assumes the truth of the allegations contained in the bill, which are properly pleaded, and we will only refer to such as we deem material.

It appears from the bill that the water company was duly incorporated under the Massachusetts Statutes of 1880, chapter 235, for the purpose of furnishing the city of Newburyport with water, and that it conducted its business until January 29, 1895.

Section 11 of its charter provided that the city should have the right at any time after ten years from the date of the completion of the water works to purchase the property, and all the rights and privileges of the company, at such price as might be mutu-
149 ally agreed upon, and, in case the water company and the city were unable to agree, the compensation was to be determined by three commissioners to be appointed by the State court. The city did not avail itself of the right to purchase under this act.

In 1893 the legislature passed an act which authorized the city of Newburyport to supply itself with water. Stat. 1893, chapter 471.

By section 12 of that act it was provided that at any time within sixty days after the passage of the act the water company might notify the mayor of Newburyport in writing that it desired to sell to the city its corporate property, and all the rights and privileges of the company, and to execute and deliver to the city proper deeds and instruments in writing, conveying to said city the property aforesaid: "Provided, however, the legal voters of the city of Newburyport, at legal meetings to be called in the several wards of said city within six months after said notification has been received as aforesaid, shall, by a majority vote of the voters of said city present and

voting thereon at said meetings, vote to purchase the aforesaid property upon the terms and conditions contained in this section, whereupon the property thus conveyed shall become the property of the City of Newburyport, and said city shall be liable to pay to said company the fair value of the property thus conveyed." Section 13 provided that "after the vote provided for in section 12 of this act, or provided the Newburyport Water Company does not so notify the said mayor within the sixty days, this act shall be submitted to the legal voters of the city of Newburyport for their acceptance or rejection, at legal meetings to be called in the several wards of said city within eight months from the passage of this act, and shall take effect from and after its acceptance by a two-thirds vote of the voters of said city present and voting thereon at said meetings."

Within sixty days after the passage of this act the water company notified the city of its desire to sell under the provisions of the act. On August 25, 1893, the city by a majority vote declined to purchase the property; but on September 7, 1893, voted the acceptance of chapter 471 of the act of 1893, authorizing it to build new water works.

The act of 1894 (Stat. 1894, chap. 474) provided that within
150 thirty days after the passage of the act the water company should notify the mayor of the city of Newburyport in writing, that it desired to sell to the city "all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants under the authority of chapter 471 of the Acts of the Year 1893, unless it shall have first purchased of said company the property aforesaid, and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same." The act further provides for a meeting of the legal voters to vote upon the question of purchase, and that if the city shall vote to purchase, the water company shall execute and deliver to the city proper deeds and instruments in writing "conveying to said city the property aforesaid, and said property thus conveyed shall thereupon become the property of said city, and said city shall pay to said company the fair value thereof, to be ascertained as hereinafter provided." And further, that in case the city and water company should be unable to agree upon the value of said property, the supreme judicial court shall appoint three commissioners to determine the fair value of said property for the purposes of its use by said city, and whose award when accepted by the court shall be final. "Such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company."

Within thirty days after the passage of this statute, a meeting of the stockholders of the water company was held, and a vote was adopted, to the effect that the company desired to sell to the city the

property described in the statute, and notice of said vote was on the same day sent to the city, and on January 15, 1895, a majority of the legal voters of said city voted to purchase the property of the water company, and on January 29, 1895, the water company conveyed its corporeal property to the city, and in paragraph 26 of its deed it purported to convey "all the rights, privileges and easements heretofore acquired under chapter 235 of the Acts of the Legislature of Massachusetts for the Year 1880, and now used by said com-
151 pany, of laying and maintaining water pipes and mains in said streets, and of making connections therewith for the purpose of supplying said city and the inhabitants thereof with water, and all property, property rights, corporate property, privileges, easements, waters and water rights of said company, whether herein particularly described or not, and all the rights and franchises of said company, whether for supplying water to the city of Newburyport and the inhabitants thereof, and of collecting water rates therefor, or otherwise, hereby conveying to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water."

On January 31, 1895, the city took possession of the property of the water company, and as the water company and the city were unable to agree upon the price to be paid for the property, the water company on February 7, 1895, petitioned the court for the appointment of commissioners under the act of 1894. The commissioners were duly appointed and their report made February 3, 1897, showed that in their view the statute of 1894 excluded from their consideration any valuation of the franchise right of the company, or of its future earning capacity or good will.

The questions of law were reserved and argued before the full court, and on June 14, 1897, the court rendered an opinion holding that the decision of the commissioners was correct, and that under the act of 1894 the city was not required to pay the water company anything for its franchises, future earning capacity or good-will.

Subsequently the water company petitioned for a rehearing in the State court.

The bill alleges that the value of the rights of the water company which were excluded by the commissioners amounted to $475,000, and that the State court held they were properly so excluded under the act of 1894.

The bill further avers that after the passage of the act of 1893, permitting the city to build competing water works, the water company petitioned the legislature that the City of Newburyport should, before supplying its inhabitants with water, purchase "the
152 franchise, corporate property and all the rights and privileges of said Newburyport Water Company." As a result of this petition the legislature passed the act of 1894.

The bill further avers that the action of the water commissioners under the act of 1894 resulted in the deed of January 29, 1895, and

that such conveyance by the water company "was voluntary in name and form only, and was in fact compulsory; and that said offer of sale and deed were made by said company to said City of Newburyport 'under the threat of municipal competition' by said city, and to avoid the ruin which would have resulted from such competition by said city; and that the said acts by which said city came into and obtained possession of the property described in said deed constituted a taking of such property in violation of the rights secured to plaintiff by the Constitution of the United States."

The bill (among other things) prays that chapter 474 of the act of 1894 may be decreed to be unconstitutional, and the deed cancelled and the property received thereunder restored to the complainant, or if the defendant is permitted to retain the property upon paying to the complainant just compensation for the entire property, the amount of compensation may be ascertained and the defendant be ordered to pay to the complainant the amount thereof.

The defendant demurs to the bill for want of jurisdiction, want of equity and on other grounds.

It is contended that on the face of the bill this is an attempt to review and retry here a case between the same parties already tried and determined in the State court.

The answer to this is that the constitutional questions set out in this bill were not raised in the State court and could not have been drawn in question in that suit.

Moore v. Sanford, 151 Mass., 285.
Pitkin v. Springfield, 112 Mass., 509.

In *Moore v. Sanford*, the plaintiffs, in 1885, filed a petition under the statute for damages sustained by the taking of their lands, and in 1889 brought a bill in equity to test the constitutionality of the statute, and to set aside the taking as unconstitutional. In holding that the plaintiffs had a right, by an independent proceeding,
153 to dispute the validity of the taking and the constitutionality of the act, the court said:

"The plaintiffs were entitled to have the question of the constitutionality of the statute determined, and under their petition for damages they were, by necessary inference, compelled in that proceeding to admit that it was constitutional."

If the question of the constitutionality of the act of 1894 was not open to the complainant in the proceeding in the State court, the objection that the complainant should have raised the question in that suit falls to the ground, and constitutes no defence to the present bill.

Nor do we think that the complainant is chargeable with such laches as to bar its right to bring this bill.

The bill was brought before the suit in the State court was finally determined, and before the acceptance by the complainant of the award.

Moore v. Sanford, ubi supra.

The fundamental question raised by the demurrer is whether the bill sets out a cause of equitable relief, or a "taking" of the complainant's property without "due process of law" or just compensation, in violation of the fourteenth amendment of the Constitution of the United States.

The bill alleges that the deed of the water company to the city under the act of 1894 was voluntary in name and form only, and was in fact compulsory, and was made under threat of competition by the city and to avoid the ruin which would have resulted from such competition, and that this constituted a "taking" in violation of a constitutional right.

We must assume, for the purpose of this demurrer, that the complainant took advantage of the act of 1894, under a threat of competition by the city which would have been ruinous to its property, and that its subsequent acts and conduct resulted from such threat. It further appears that under the construction given to the act of 1894 by the State court no compensation was allowed the complainant for its franchise rights, future earning capacity, or goodwill.

In *Swift Co v. United States*, 111 U. S., 22, a payment made to a public officer in discharge of a fee or tax illegally exacted is
154 not such a voluntary payment as will preclude the party from recovering it back. The court said:

"The question is, whether the receipts, agreements, accounts and settlements made in pursuance of that demand and necessity were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right.

We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria*."

In *Robertson v. Frank Bros. Co.*, 132 U. S. 17, it was held that the payment of money to a customs official, to avoid an onerous penalty, though the imposition of that penalty may have been illegal, is sufficient to make the payment an involuntary one.

The court, speaking through Mr. Justice Bradley, said:

"It was contended by the counsel for the Government at the trial, and is contended here, that the payment of the duties complained of was a voluntary payment, inasmuch as the plaintiffs themselves made the additions to the entries and invoices, and that, therefore, they cannot recover back any part of the money so paid; and they requested the court below to instruct the jury to render a verdict for the defendant. This the court refused to do; and left it to the jury to decide, upon the evidence, whether the making of the additions was a voluntary act on the part of the plaintiffs, or done under constraint in view of the penalty sure to be imposed in case it was not done."

In *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U. S. 226, it was held that a judgment of a State court, even if authorized by statute, whereby private property is taken for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the Constitution of the United States; and that the defendant has been deprived of property without due process of law is not entirely met by the suggestion that he had due notice of the proceedings for condemnation, appeared, and was admitted to make defence.

Demurrer overruled.

155 Circuit Court of the United States, District of Massachusetts.
In Equity.

NEWBURYPORT WATER COMPANY
v.
CITY OF NEWBURYPORT. } No. 924.

Before Colt and Brown, JJ.

Opinion of the Court, August 8, 1900.

COLT, *J.:*

Under the stipulation of counsel and order of court, the single question now presented is whether the plaintiff has been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States; all other questions as to the plaintiff's relief under its bill, including the question of valuation of the property alleged to have been taken, are to await the determination of the constitutional question.

The plaintiff, The Newburyport Water Company, was chartered by the State of Massachusetts in 1880, to supply the city of Newburyport and its inhabitants with water (Mass. St. of 1880, ch. 235). The company thereupon constructed a system of water works and proceeded to supply the city and its inhabitants with water. In 1893 the city petitioned the legislature for authority to build its own waterworks.

Notwithstanding the opposition of the company, the legislature passed the act of June 10, 1893, (Mass. St. of 1893, ch. 471)
156 authorizing the city to establish waterworks. After the vote by the city upon the acceptance of the act, the counsel for the city claimed and advised that the city had the right to supply itself and its inhabitants with water.

Thereupon, the company applied to the legislature to have the city required to purchase its waterworks before it proceeded to supply itself and its inhabitants with water. The application resulted in the passage of the act of June 14, 1894 (Mass. St. of 1894, ch. 474).

This act provided that the city should not proceed to build water works under the act of 1893 unless it should first purchase the company's property which it might do by a majority vote; and that, the city having so voted, the company should within twenty days execute and deliver to the city proper deeds conveying its property; that the property conveyed should thereupon become the property of the city, and that the city should pay to the company the fair value thereof, which if not agreed upon, should be determined by three commissioners appointed by the supreme judicial court, who should determine the fair value of the property "for the purposes of its use by said city," and "without enhancement on account of future earning capacity or good will, or on account of the franchise of said company."

The city voted to purchase; and, on January 29, 1895, the company executed and delivered to the city a duly authorized deed of all its property and franchise rights. The city took possession of the property and has ever since managed and operated it.

After the conveyance, commissioners were appointed, and on February 3, 1897, they filed in the State court their award. Questions of law arising on the award were reserved by a single justice for the full court, and on June 14, 1897, that court made an order sustaining the action of the commissioners. The commissioners estimated the value of the company's property for the purposes of its use by the city, and excluded from such valuation its future earning capacity, good will, and its right to the use of the streets and to collect water rates.

In order to sustain the contention that the plaintiff has been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States, it is necessary to show, as the plaintiff declares in its brief:

1. That the plaintiff's property was taken for public uses.

157 2. That the property was taken under color of the authority of a State.

3. That the taking was without just compensation.

The plaintiff bases the taking of its property upon the legislative threat to authorize municipal competition, whereby its deed to the city became voluntary only in form while in fact it was compulsory. This threatened competition, it is claimed, forced the plaintiff, against its will, to convey its property to the city for an insufficient consideration, and made the deed in effect a *taking* of property without just compensation under color of legislative authority.

The proposition here advanced requires a somewhat extended examination of the acts of 1893 and 1894 and their general bearing upon the single issue before us.

At the outset, it may be observed, that if the plaintiff establish a *taking* of its property, under the acts of 1893 and 1894, it is clearly right in its contention that such taking was without just compensation. The act of 1894 provided that the valuation of the property should be "the fair value of said property for the purpose of its use by said city," and "such value shall be estimated without enhance-

ment on account of future earning capacity or good will, or on account of the franchise of said company." A *taking* under an act providing such a method of compensation would be unconstitutional because without just compensation. It would be a taking "without due process of law" in violation of the fourteenth amendment.

Where private property is taken for public uses, the legislature cannot fix the compensation, or determine in what it shall consist, or prescribe the rules and principles upon which it shall be computed. Lewis on Eminent Domain, sec. 461. When a taking has been ordered, the question of compensation is judicial, not legislative. The legislature cannot extinguish any part of such compensation, or in any manner "interfere with the just powers and province of courts and juries to administer rights and justice."

It is sufficient on this point to cite the language of the Supreme Court in two cases. In *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 327, the court said:

"By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—
158 that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 571, Mr. Justice McLean in his opinion, referring to a provision for compensation found in the charter of the Warren bridge, uses this language: 'They (the legislature) provide that the new company shall pay annually to the college, in behalf of the old one, one hundred pounds. By this provision, it appears that the legislature has undertaken to do what a jury of the country only could constitutionally do: assess the amount of compensation to which the complainants are entitled.' See also the following authorities: *Commonwealth v. Pittsburgh & Connellsville Railroad*, 58 Penn. St. 26, 50; *Penn. Railroad v. Balt. & Ohio Railroad*, 60 Maryland, 263; *Isom v. Mississippi Central Railroad*, 36 Mississippi, 300. In the last of these cases, and on page 315, will be found these observations of the court: "The right of the legislature of the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or *in any manner* to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our

Constitution. If anything *can be* clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so.' We are not, therefore, concluded by the declaration in the act that the franchise to collect tolls is not to be considered in estimating the sum to be paid for the property."

In *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 409, 410, the court observed:

"If the State were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature?"

We have to ascertain then, in order to dispose of the question before us, whether there was a *taking* of the plaintiff's property (the term "property," including franchise rights) by or under the acts of 1893 and 1894.

The *taking* complained of in this case was by right of
159 eminent domain, and not under the guise of taxation or police regulation. Eminent domain "embraces all cases where, by authority of the State and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use." Lewis on Eminent Domain, sec. 1.

Where the State grants a franchise to a corporation, and subsequently grants a similar franchise to another corporation, the question of a *taking* may be considered from three points of view. Where the first grant is not exclusive, the subsequent grant is not a taking which entitles the owner of the first franchise to compensation. Where the first grant is exclusive, the grant of a rival franchise is a taking, and just compensation must be made. Where the first grant is exclusive, the grant of a similar franchise does not constitute a taking requiring compensation, when the State, by its constitution or statute law, has reserved to itself the right to repeal, alter, or amend charters granted by the legislature. Such reservation becomes a part of the charter of every corporation. Shortly stated, the grant by the State of a competing franchise does not constitute a taking of a former non-exclusive franchise, while in the case of an exclusive franchise it does constitute a taking in the absence of a reserve power in the State. *Charles River Bridge v. Warren Bridge*, 7 Pick. 344; affirmed 11 Pet. 420; *Hamilton Gas Company v. Hamilton*, 37 Fed. Rep. 832; affirmed, 146 U. S. 258; *Greenwood v. Freight Company*, 105 U. S. 13; *Binghampton Bridge*, 3 Wall. 51; *Tomlinson v. Jessup*, 15 Wall. 454; *Spring Valley Water Works v. Schottler*, 110 U. S. 347; *Souix City Street R'y Co. v. Sioux City*, 138 U. S. 98; *Louisville Water Company v. Clark*, 143 U. S. 1; *Schurz v. Cook*, 148 U. S. 397, 410; *New York and New England R. R. v. Bristol*, 151 U. S. 556, 567; *Covington v. Kentucky*, 173 U. S. 231; *Metropolitan R. R. Co. v. Highland Railway*, 118 Mass. 290, 293; *Thornton v. Marginal Freight Railway*, 123 Mass. 32; *Piscataqua Bridge v. New Hampshire Bridge*,

7 N. H. 35; *Boston and Lowell R. R. v. Salem and Lowell R. R. Co.*, 2 Gray, 1; *Power v. Village of Athens*, 99 N. Y. 592.

The act of 1893 authorized the city to supply itself and its inhabitants with water, provided, if the company so desired, the city should first vote upon the proposition to purchase the company's works. The city voted not to purchase, and did vote to ac-
160 cept the provisions of the act. The franchise rights granted to the company by its charter were not exclusive. This is not disputed. We have then presented the question, whether the subsequent grant to the city of the right to build competing waterworks constituted a *taking* of the plaintiff's property or franchise. It is the settled law of this country, established by the decisions of the Federal and State courts, that such a grant is not a *taking* of a former franchise giving any right to compensation. "Where the grant is not by its terms exclusive, the legislature is not precluded from granting a similar franchise or erecting a rival way or structure, the result of which may be to greatly impair or even totally destroy the value of the former grant, and such damage is not a *taking* of the former franchise which entitles its owner to compensation." This principle was settled in the leading case of *Charles River Bridge v. Warren Bridge*, and has been confirmed by numerous decisions." Lewis on Eminent Domain, sec. 136.

In the case of *Charles River Bridge v. Warren Bridge*, 7 Pick. 344, the supreme court of Massachusetts held that the grant by the legislature of a competing franchise did not divest vested rights or impair the obligation of a contract.

On appeal (11 Pet. 420), the Supreme Court of the United States placed its decision on the latter ground. This was before the passage of the fourteenth amendment, so that the only Federal constitutional right involved related to contract.

In *Hamilton Gas Light Co. v. City of Hamilton*, 37 Fed. Rep. 832, 836, where a municipality was proceeding to construct competing gas works under a State statute, the point was taken that the statute interfered with vested rights, and impaired, if it did not destroy, the property of the company, and was in effect an appropriation of private property to public use without making compensation, in violation of the fourteenth amendment to the Constitution of the United States. The court decided against this contention.

In the Supreme Court, on appeal (146 U. S. 258), as appears from the statement of the case by the court on page 259, the plaintiff invoked the protection of the contract clause of the Constitution, as well as the clause that no State shall deprive any person of property without due process of law. The court, in its opinion, affirming the judgment below, only discusses the question whether there was any impairment of the obligation of a contract, and by im-
161 plication, at least (for the point was necessarily involved in the decision), held that the claim that the plaintiff was deprived of its property without due process of law was so untenable as a legal proposition as not to require discussion.

It may be said that since the decision in *Charles River Bridge v.*

Warren Bridge, the Supreme Court and other courts in this country have recognized the law as settled, that where the State grants a franchise, which is not by express terms made exclusive, the subsequent grant of a similar and competing franchise impairs no constitutional right; that it is neither a violation of the obligation of a contract, nor an impairment of vested rights, nor a taking of property without just compensation.

In *Fort Plain Bridge Company v. Smith*, 30 N. Y. 44, 61, the court observed:

"Since the case of *The Charles River Bridge v. The Warren Bridge* (11 Peters 420), it has been understood to be the law that it is competent for the legislature, after granting a franchise to one person or corporation, which affects the rights of the public, to grant a similar franchise to another person or corporation, the use of which shall impair or even destroy the value of the first franchise, although the right so to do may not be reserved in the first grant; unless the right so to do is expressly prohibited by the first grant."

In The *Salem and Hamburgh Turnpike Company v. Lyme*, 18 Conn. 451, 457, the court said:

"Since the decision of this court in the case of *The Enfield Toll Bridge Company v. The Hartford and New Haven Railroad Company*, 17 Conn. R. 454, and of the Supreme Court of the United States in the case of *The Charles River Bridge v. The Warren Bridge*, 11 Peters, 420, and the numerous decisions to the same effect, cited in those cases, we do not think it an open question, whether a new road, canal, or bridge, materially diverting travel or business from an old one under a prior charter, is therefore unconstitutional, or to be suppressed."

In The *Lafayette Plankroad Company v. The New Albany & Salem Railroad Company*, 13 Ind. 90, 92, the court declared:

"The grant of a charter for a road, a bridge, or a ferry, does not estop the legislature from granting a subsequent charter for a road, bridge, or ferry, which may compete with the former in the transportation of freight and passengers between given points; and the simple fact that the two run parallel, and mutually diminish the business of each other, is no ground for a claim by either for damages."

162 Although the Supreme Court, in those cases where the exercise of this power by or under the State has been disputed, has usually confined the discussion of the alleged violation of constitutional rights to the contract clause, the language of the court in those cases is instructive, and has an important bearing on the specific question under consideration. In *Lehigh Water Company v. Easton*, 121 U. S. 388, 390, the court said:

"By constructing waterworks of its own, the borough will not destroy the franchises of the plaintiff company. It may impair their value, and probably will do so; but of this the company have no legal cause of complaint. The granting of a new charter to a new corporation may sometimes render valueless the franchises of an existing corporation; but unless the State by contract has precluded

itself from such new grant the incidental injury can constitute no obstacle."

In *Stein v. Bienville Water Co.*, 141 U. S. 67, 81, the court said:

"Guided by this rule, in respect to which there is no difference of opinion in the courts of this country, we are forbidden to hold that a grant under legislative authority, of an exclusive privilege, for a term of years, of supplying a municipal corporation and its people with water drawn by means of a system of water works from a particular stream or river, prevents the State from granting to other persons the privilege of supplying, during the same period, the same corporation and people with water drawn in like manner from a different stream or river."

In *Hamilton Gas Co. v. Hamilton*, 146 U. S. 258, the company maintained that its charter was exclusive. The city was proceeding to build works of its own, claiming statutory authority therefor. As we have already observed, the company in that case contended that this was an impairment of its charter, and a taking of its property without due process of law.

The court observed at page 268:

"It may be that the erection and maintenance of gas-works by the city at the public expense, and in competition with the plaintiff, will ultimately impair, if not destroy, the value of the plaintiff's works for the purposes for which they were established. But such considerations cannot control the determination of the legal rights of the parties."

In *Pearsall v. Great Northern Railway*, 161 U. S. 646, 664, the court said:

"An exclusive right to enjoy a certain franchise is never presumed, and unless the charter contain words of exclusion, it is no im-
163 pairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed. This principle was laid down at an early day in the case of the *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, and has been steadily adhered to ever since."

Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, was an appeal from the New York court of appeals. The court (p. 696) said:

"The court of appeals held that neither the statute under which the company was organized, nor the contract, nor the act of annexation, gave to the company rights exclusive and beyond the reach of legislative action. These conclusions of the court of appeals are vigorously challenged in the argument, but we are of opinion that they are correct. The statute simply provided for the organization of water companies. The contract in terms contained no words of exclusion. It gave to the company the privilege of laying its mains in the streets of the town, and contained a covenant on the part of the town to pay certain hydrant rentals. But grants from the public are strictly construed in favor of the public, and grants of a privilege are not ordinarily to be taken as grants of an exclusive privilege."

As the franchise granted to the plaintiff by its charter was not

exclusive, the subsequent grant by the act of 1893 giving the city authority to construct independent and competing waterworks was not a violation of the plaintiff's charter, or of any constitutional right.

In establishing the power of the legislature to grant a competing franchise, the conflict has been between the rightful claims of the public and the protection secured to private property by constitutional provisions. Before the case of *Charles River Bridge v. Warren Bridge* (1837), many eminent judges and lawyers were of the opinion that such legislation impaired vested rights of property and violated the contract between the State and the corporation secured by charter. In that case, however, it was successfully urged, though the court were divided in opinion, that the grant by the sovereign authority of a franchise to build a bridge over a public water-way, and to collect tolls, did not prohibit the grant of another franchise to construct a bridge over the same water-way which was free to the public, though the effect was to impair, or even destroy, the value of the first grant. Whatever doubt may have formerly existed as to this power of the legislature, and however cogent and just the argument may be against its exercise in a particular case, the right of the legislature to exercise it in any case cannot now be
164 questioned; and when a franchise is now obtained for the purpose of establishing waterworks, or to promote like enterprises in which the public are interested, and capital is invested, it should not be upon the assumption or belief that the town or city will refrain from competition and the legislature will refuse to authorize it. On the contrary, this legislative power having been upheld and enforced for so many years it may well be presumed that when a franchise is obtained which is not exclusive, it is taken with the knowledge and risk that the legislature is not precluded from granting, at any moment, a similar and competing franchise.

Before examining the act of 1894, it may be well to call attention to some preliminary considerations. The plaintiff contends that the *taking* in this case was wholly under the act of 1894, and that the act of 1893 never took effect, because the "vote to purchase" the company's works, under section 12 of the act, was a condition precedent to the city's right to vote to supply itself and its inhabitants with water under section 13; and the city having voted not to purchase, the act failed, and, consequently, the subsequent vote by the city to accept the provisions of the act was nugatory. This construction seems contrary to the intent and purpose of the act. The natural and reasonable construction of sections 12 and 13, looking at the whole act, is that the city should first decide whether it would purchase the plaintiff's works before determining whether it would build works of its own. For the purpose of our present inquiry, however, it is unnecessary to pass upon this question. If the act of 1893 were in force, as contended by the defendant, there was, as we have seen, no *taking* of the plaintiff's property under it. If it were not in force, there surely was no such taking. But whether legally in force or not, it clearly appears that it was the fear or belief of the

company, the city, and the legislature, that the act of 1893 was operative which led to the passage of the act of 1894.

After the vote by the city accepting the act of 1893, the company petitioned the legislature that the city should buy its property and franchise before proceeding to build waterworks under the act. Accompanying this petition was a proposed bill, which provided that the city should, "before proceeding to supply itself and its inhabitants with water under the authority of chapter four hundred and seventy-one of the Acts of the Year One thousand eight hundred and ninety-three, purchase from the Newburyport Water
165 Company the franchise, corporate property, and all the rights and privileges of said Newburyport Water Company." It further provided that the compensation to be paid by the city should be determined by three commissioners appointed by the supreme judicial court.

Thereupon, the legislature passed the act of 1894, obliging the city to purchase the plaintiff's works before proceeding to supply itself and its inhabitants with water under the act of 1893, and at the same time fixing the measure of compensation to be paid by the city.

Section 1 declares:

"If, within thirty days after the passage of this act, the Newburyport Water Company shall notify the mayor of the city of Newburyport in writing that it desires to sell to said city all the rights, privileges, easements, lands, waters, water rights, dams, reservoirs, pipes, engines, boilers, machinery, fixtures, hydrants, tools and all apparatus and appliances owned by said company and used in supplying said city and the inhabitants thereof with water, said city shall not proceed to supply water to itself or its inhabitants, under the authority of chapter four hundred and seventy one of the Acts of the Year Eighteen hundred and ninety-three, unless it shall have first purchased of said company the property aforesaid; and said company is authorized to make sale of said property to said city, and said city is authorized to purchase the same."

The act then provides that whenever the city shall vote to purchase said property, "notice of the desire of said company to sell the same having been given as hereinbefore provided," the company shall within twenty days convey by deed its property to the city, and the city shall pay "the fair value thereof to be ascertained as hereinafter provided." If the parties are unable to agree upon the value of the property, commissioners are to be appointed "who shall determine the fair value of said property for the purposes of its use by said city, and whose award, when accepted by the court, shall be final. Such value shall be estimated without enhancement on account of future earning capacity or good will, or on account of the franchise of said company." Section 4 of the act declares:

"In case said city shall, in violation of section one of this act, proceed to supply itself or its inhabitants with water before making the purchase aforesaid, the supreme judicial court shall, upon peti-

tion of said company, have jurisdiction in equity to enjoin said city from so doing until it shall have made such purchase."

Before the consideration of what the plaintiff claims was the legal effect of this act let us refer for a moment to its manifest
166 purpose. Recognizing the act of 1893 as in force, it simply prohibits the city from exercising the right to build waterworks under that act if the plaintiff desires to sell its works to the city upon the terms provided. There is certainly nothing on the face of the act which authorizes the taking of the plaintiff's property without its consent. It does not in terms compel the company to sell its property to the city. On the contrary, it expressly declares that the company may do so if it "desires."

If the act provide for a voluntary conveyance, the insufficiency of the consideration prescribed has no bearing on the issue before us. The question of compensation becomes material only in the event that the sale under the act was made without the plaintiff's consent. If this does not appear, there is no violation of the constitutional right now invoked, whatever other relief the plaintiff may be entitled to.

The great injury which at this time threatened the company's property was municipal competition under the act of 1893, and the act of 1894 was passed as a protection against such impending disaster. The legislature might have provided in that act, and there is much force in the contention that in justice and equity it ought to have provided, that the plaintiff should receive full compensation for its property purchased by the city, but the failure of the legislature to make such provision cannot change the nature and scope of a statute which authorized a voluntary sale into a statute which authorized the taking of the plaintiff's property without its consent by right of eminent domain.

We will now consider more directly and specifically the general argument advanced by the plaintiff to establish a *taking* of its property without just compensation. This argument may be summarized as follows:

The act of 1893 never took effect and was void except so far as it was re-enacted in the act of 1894; the act of 1894 was in effect a threat by the State that it would authorize the city to build competing waterworks and so ruin the company, unless it consented to convey its property to the city without just compensation; that in consequence of such threat the company conveyed its property to the city; that by reason of such threat the deed of conveyance though voluntary in form was in fact compulsory; that
167 such compulsion constituted duress and made the conveyance a *taking;* that such taking was plainly without just compensation by the terms of the act. Stated in another form the proposition is that a threatened lawful grant by the State to *B* of a franchise similar to one already granted to *A* is an exercise of unlawful compulsion on the part of the sovereign authority, and that a voluntary conveyance of property under a statute containing such a threat, and not providing for full compensation, is voluntary only

in form, while in fact it is made under duress; that, consequently, such a statute in effect authorized a *taking* of property without just compensation in violation of a constitutional right.

The plaintiff's contention is founded upon the hypothesis that the right of the city to build competing waterworks under the act of 1893 did not exist when the act of 1894 was passed. If, however, the act of 1893 was in force at that time, as we are inclined to hold, then the State threatened nothing by the act of 1894 because it had already authorized municipal competition. In that case we are confronted with this question, whether, the city having the right to compete, it was lawful for the legislature to pass the act of 1894 forbidding the city so to do, providing the company chose to sell on terms which did not award full compensation for its property. But it can hardly be seriously urged that when the company was met by legal competition which meant ruin, it was unlawful for the legislature to pass an act which at least made the situation less disastrous, and providing at the same time that the company need not avail itself of the act unless it saw fit.

Nor is the situation any different in principle if we assume that the act of 1893 was void, and that we have only to consider the act of 1894. The only difference is that in one case the legislature had authorized legal competition, and in the other, as it is claimed, it threatened to authorize legal competition. But if competition be lawful, threatened competition is lawful. And if it were lawful for the State to authorize municipal competition, it was not unlawful for it to threaten to authorize municipal competition.

But it is urged, and this is the crucial point in the plaintiff's argument, that the threat of competition produced compulsion which amounted to duress, and, consequently, made the sale by the company to the city not a voluntary but a compulsory act, and being compulsory its effect was a *taking* of the plaintiff's property
168 without just compensation. The plaintiff's whole position hinges on the question of compulsion.

In approaching this question it may be observed that there was a greater degree of compulsion on the part of the State if we assume the act of 1893 was operative than if we assume it was void. In the former case municipal competition had actually been authorized, while in the latter case it was only threatened.

But what was the compulsion in this case? It was the compulsion arising from the fear of competition produced by what is termed the threat of the State to authorize municipal competition. If a person apprehensive of competition sells his property for less than its fair value, it cannot be said that in law the sale was voluntary in form only, and in fact compulsory. In a certain sense, such a sale is compulsory. It is, however, a kind of compulsion which will always exist so long as competition exists. But this is not the kind of compulsion that amounts in law to duress because it lacks the essential ingredient of duress, namely, illegality. It is unlawful compulsion which constitutes duress. "Duress exists," says Judge Cooley, "when one, by the unlawful act of another, is induced to make a

contract or perform some act under circumstances which deprive him of the exercise of free will." *Hackley v. Headley*, 45 Mich. 569, 574. Duress by the Government or its officers, in this class of cases, is defined by the Supreme Court as "moral duress not justified by law." *Maxwell v. Griswold*, 10 How. 242, 256. It must be the pressure arising from unlawful acts or demands on the part of the Government or its officers to produce that constraint of will or action, or state of necessity or compulsion, which render acts voluntary in form, involuntary and void. In this class of cases the test is, was the cause of the compulsion lawful or unlawful. If the compulsion be founded on lawful competition, or the threat of lawful competition there is no element of illegality about it. Such compulsion is justified by law.

The whole question of compulsion or duress in this case turns upon whether municipal competition, actual or threatened, under the authority of the State, was justified by law. If it were, as we have shown, then the deed to the city was not given under unlawful compulsion or duress, but was voluntary in fact and in law. On the other hand, it may be said, that if it had been unlawful for the State to authorize municipal competition, then the threat so to do might have been held to have amounted to duress not justified by law,
169 and, consequently, the deed of the plaintiff's property to have been in effect a *taking* without just compensation under the authority of the State.

In the Supreme Court cases relied on by the plaintiff it will be found that the compulsion or duress was based upon an illegal act or exaction, or threatened illegal act or exaction, by the Government or its officers.

United States v. Tingey, 5 Pet. 115, 129, was a suit brought by the Government upon a bond, variant from that prescribed by law, demanded of a public officer upon the peril of losing his office. Mr. Justice Story, delivering the opinion of the court, said:

"The substance of this plea is, that the bond, with the above condition, variant from that prescribed by law, was, under color of office, extorted from Deblois and his sureties, contrary to the statute, by the then Secretary of the Navy, as the condition of his remaining in the office of purser, and receiving its emoluments. There is no pretence then to say, that it was a bond voluntarily given, or that, though different from the form prescribed by the statute, it was received and executed without objection. It was demanded of the party, upon the peril of losing his office; it was extorted under color of office, against the requisitions of the statute. It was plainly, then, an illegal bond; for no officer of the Government has a right, by color of his office, to require from any subordinate officer, as a condition of holding office, that he should execute a bond with a condition different from that prescribed by law; that would be, not to execute, but to supersede, the requisitions of law; it would be very different, where such a bond was, by mistake or otherwise, voluntarily substituted by the parties for the statute bond, without any coercion or extortion by color of office."

Maxwell v. Griswold, 10 How. 242, was a case where an appraisement of imported goods was erroneously made as to the point of time of the valuation, and the importer paid the consequent excess of duties. The Government contended that this was voluntary. The court (p. 256) said:

"But this addition and consequent payment of the higher duties were so far from voluntary in him, that he accompanied them with remonstrances against being thus coerced to do the act in order to escape a greater evil, and accompanied the payment with a protest against the legality of the course pursued towards him.

Now, it can hardly be meant in this class of cases, that, to make a payment involuntary, it should be by actual violence, or any physical duress. It suffices, if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment.

170 All these requisites existed here. We have already decided, that the demand for such an increased appraisal was illegal. The appraisal itself, as made, was illegal. The raising of the invoice was thus caused by these illegalities in order to escape a greater burden in the penalty. The payment of the increased duties thus caused was wrongfully imposed on the importer, and was submitted to merely as a choice of evils.

He was unwilling to pay either the excess of duties or the penalty, and must be considered, therefore, as forced into one or the other by the collector, *colore officii*, through the invalid and illegal course pursued in having the appraisal made of the value at the wrong period, however well meant may have been the views of the collector.

The money was thus obtained by a moral duress, not justified by law, and which was not submitted to by the importer, except to regain possession of his property withheld from him on grounds manifestly wrong."

In *Swift Company v. United States*, 111 U. S. 22, 28, the plaintiffs, who were manufacturers of matches and furnished their own dies for the stamps used by them, and were thereby entitled to a commission of ten per cent. in money on the price of the stamps, accepted for a long period their commissions in stamps because the Treasury Department would pay in no other manner. The court held that the apprehension of being stopped in their business by this illegal exaction was a sufficient moral duress to make their payments involuntary. Mr. Justice Matthews, delivering the opinion of the court, said:

"The question is, whether the receipts, agreements, accounts, and settlements made in pursuance of that demand and necessity, were voluntary in such sense as to preclude the appellant from subsequently insisting on its statutory right. We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It

was in the power of the officers of the law, and could only do as they required. Money paid or other value parted with, under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *volenti non fit injuria.*"

In support of the position taken, the court (p. 29) referred to numerous cases:

"In *Close v. Phipps*, 7 M. & Gr. 586, which was a case of money paid in excess of what was due in order to prevent a threatened sale of mortgaged property, Tindal, C. J., said: 'The interest of the plaintiff to prevent the sale, by submitting to the demand, was so great, that it may well be said the payment was made under
171 what the law calls a species of duress.' And in *Parker v. Great Western Railway Company*, 7 M. & Gr. 253, the wholesome principle was recognized that payments made to a common carrier to induce it to do what by law, without them, it was bound to do, were not voluntary, and might be recovered back. Illegal interest, paid as a condition to redeem a pawn, was held in *Astley v. Reynolds*, 2 Stra. 915, to be a payment by compulsion. This case was followed, after a satisfactory review of the authorities, in *Tutt v. Ide*, 3 Blatchf. 249; and in *Ogden v. Maxwell*, 3 Blatchf. 319, it was held that illegal fees exacted by a collector, though sanctioned by a long continued usage and practice in the office, under a mistaken construction of the statute, even when paid without protest, might be recovered back, on the ground that the payment was compulsory and not voluntary."

The court then cites *Maxwell v. Griswold*, 10 How. 242, and other cases.

In *Robertson v. Frank Brothers Company*, 132 U. S. 17, a customs official proceeded in his appraisement upon a wrong principle contrary to law, and it was held that the compulsory insertion, under threat of an onerous penalty, by the importer of such additional charges upon the entry and invoice, which necessity involved the payment of increased duties, makes the payment of those duties involuntary.

In delivering the opinion of the court, Mr. Justice Bradley (p. 24) said:

"In our judgment the payment of money to an official, as in the present case, to avoid an onerous penalty, though the imposition of that penalty might have been illegal, was sufficient to make the payment an involuntary one. It is true that the thing done under compulsion in this case was the insertion of the additional charges upon the entries and invoices; but that necessarily involved the payment of the increased duties caused thereby, and in effect amounts to the same thing as an involuntary payment."

Mr. Justice Bradley in that opinion refers to the language of the decisions in *Maxwell v. Griswold*, and *Swift Company v. United States* which we have cited, and in speaking of the former case he declares that "the ultimate fact was the moral duress not justified by law."

In the above cases, which are cited by the plaintiff, it is seen that it is the element of illegality which lies at the foundation of this

species of duress. In those cases the moral duress was caused by the illegal acts or demands of the Government or its officers. In the case at bar there was no moral duress not justified by law, because it was lawful for the State to authorize, or threaten to author-
172 ize, municipal competition. There would have been a close analogy between those cases and the present, if the plaintiff had possessed an exclusive franchise, and the legislature had, contrary to law, authorized, or threatened to authorize, municipal competition. In that event it might have been claimed that the company was compelled to convey its property to the city under an unlawful exercise of legislative power, and, therefore, under moral duress not justified by law.

The plaintiff argues that the measure of compensation provided by the act of 1894 was not justified by law, and that, consequently, the principle recognized in the above cases is applicable to the present case. But this is an attempt to connect things that are entirely distinct. The compensation to be paid for the plaintiff's property has nothing to do with the subject of duress. It was not the want of just compensation, but the threat of municipal competition, which was the cause of the alleged duress. To connect the alleged duress with the lack of compensation involves the proposition that the compulsion which forced the plaintiff to deed its property to the city was owing to the unlawful compensation provided by the act of 1894, and not to the threatened competition by the city. The want of just compensation has no bearing on the question before us unless the plaintiff first establishes a duress not justified by law.

And this brings us to the decisive point on the issue under consideration, and the conclusion we have reached.

We hold, for the reasons already given, that the grant of a competing franchise to the city in this case was a lawful exercise of legislative power, and that the threatened grant of such a franchise under the act of 1894 (admitting this to be the effect of the act) was a lawful exercise of legislative power, and that, being lawful, it could not in either case have the legal effect of making a voluntary conveyance of the plaintiff's property, compulsory and void, and that, consequently, the plaintiff has failed to establish a *taking* of its property without just compensation under the authority of the State.

Upon the single question submitted for our determination, and without passing on any other question concerning the plaintiff's relief under the bill, we are of opinion, after careful consideration, that the plaintiff has not been deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States, and a decree may be drawn accordingly.

173 Circuit Court of the United States, District of Massachusetts.
In Equity.

NEWBURYPORT WATER COMPANY
v.
CITY OF NEWBURYPORT. } No. 924.

Before Colt and Brown, JJ.

Opinion, March 5, 1902.

Per curiam (as amended): It has been decided by this court, upon full and careful consideration, that there was no taking of the complainant's property under the acts of 1893 and 1894; that the deed of the complainant's property was voluntary, and not compulsory; and that, consequently, the complainant had not been deprived of its property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States. The complainant now maintains that the act of 1894 was in violation of section 10 of article 1 of the Constitution, which provides that "No State shall pass any law impairing the obligation of contracts." The complainant raises this question by asking the court to admit the testimony of the commissioners appointed to value the complainant's property under the act of 1894 to the effect that they did not
174 in fact value the water contract entered into between the complainant and defendant.

The act of 1893 authorizes municipal competition, which the legislature had legal right to authorize. The act of 1894 forbids municipal competition, provided the complainant chose to deed its property to the defendant on the terms specified. This act did not impair any contract which had been entered into between the complainant and defendant. It simply gave the complainant the option if it chose, to sell its property to the defendant on the terms mentioned. The complainant, if it so desired, could have retained its property and its contract with the defendant; but it did not do so, and voluntarily deeded its property to the defendant. If it lost any right to any contract by this action, it was because it deemed it wise to take advantage of the provisions of the act of 1894, which obliged the defendant to buy the water works, if the complainant so desired, before it should undertake to build water works of its own.

Assuming that this testimony could properly be offered at this stage of the case (a question which we do not find it necessary to pass upon), and that the complainant could show that the commissioners did not in fact value the water contract in estimating the value of the complainant's property, we are of the opinion that this testimony would not be material and that it would be entirely ineffectual. It does not tend to prove that the act of 1894 was in violation of the contract clause of the Constitution, because what was

done or omitted by commissioners appointed under the act could not effect the terms of the legislative act itself or make the act unconstitutional. Furthermore, after a full hearing upon the
175 question of duress, this court has already decided that all the proceedings which took place under the act of 1894 were entered into voluntarily by the complainant in order to avoid great disaster arising from municipal competition.

Our conclusion upon this point is conclusive against the admission of the testimony offered by the plaintiff, that the commissioners did not value the water contract.

The motion to enter the final decree dismissing the bill is granted.

176 Circuit Court of the United States, District of Massachusetts.
In Equity.

NEWBURYPORT WATER COMPANY
v.
CITY OF NEWBURYPORT. } No. 924.

Lauriston L. Scaife, Robert M. Morse, for complainant.
A. E. Pillsbury, specially, C. C. Dame, for defendant.

Docket Entries.

May T., 1897, July 21.—Bill filed, subpœna issued, returnable Sept. rules, to wit: Sept. 7, 1897.
July 21.—Affidavits of McCusker, Norman, Noyes, Piper, Jones, Mudge & Major, and certified copy opinion of supreme judicial court, filed.
July 21.—Colt, J. Summons issued, returnable July 24, 1897, at 10.30.
July 23.—Hearing postponed by agreement.
Sept. 1.—Amendment to bill filed.
Sept. 9.—Motion to dismiss bill for want of jurisdiction filed.
Sept. 13.—Colt, J. Heard on motion to dismiss and motion denied.

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May T., 1897, Sept. 27.—Demurrer filed.
Oct. 14.—Affidavit of Charles C. Dame filed.
Oct. 14.—Motion to strike affidavits of Major, Jones and Mudge from files filed.
Oct. 14.—Affidavit of John E. McCusker filed.
Oct. T., 1897, Oct. 15.—Copy agreed facts in Moore *et al. v.* Sanford *et al.* filed.
Heard before Colt, J. Oct. 23, 25 and 30.
Feb. 24.—Colt, J. Opinion filed,—demurrer overruled.
Mar. 22.—Claim of appeal filed by defendant.

Apr. 1.—Agreement as to time for filing answer filed.
Apr. 14.—Petition for rehearing on demurrer filed.
Apr. 14.—Answer filed.
Apr. 20.—Stipulation as to time for filing exceptions to answer filed.
May 9.—Exceptions to answer filed.
May T., 1898, June 27.—Brief for complainant filed.
Oct. T., 1898, Nov. 17.—Colt, J. Petition for rehearing denied.
Nov. 17.—Special demurrer received.

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Oct. T., 1898, Dec. 31.—Colt, J. Amendment of seventh prayer of bill allowed in open court by consent of court and of all parties, by transposing terms plaintiff and defendant in sixth line of page twenty-one of printed record.
Dec. 31.—Heard on motion for leave to file special demurrer before Colt, J.
Jan. 7.—Colt, J. Rescript filed, motion denied.
May T., 1899, June 10.—Stipulation filed.
June 15.—Replication filed.
" " —Agreement that exceptions to defendant's answer may be withdrawn, &c., filed.
June 20.—Colt, J. Order of court as to hearing by consent—order in files.
June 22.—Agreement filed.
Heard before Colt and Brown, JJ. pursuant to stipulation and order of court, June 28, 29 and 30.
Briefs filed.
May T., 1900, Aug. 8.—Colt & Brown, JJ. Opinion filed; decree to be entered pursuant to opinion.
Oct. T., 1900, Jan. 10.—Proposed final decree submitted by defendant.
Jan. 10.—Colt and Brown, JJ. Benj. H. Bradlee appointed special examiner.
Mar. 22.—Stipulation filed.

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May T., 1901, May 22.—Motion for final decree filed.
May 22.—Heard before Colt & Brown, JJ. on questions raised by stipulation filed March 22, 1901.
May 27.—Briefs filed.
Oct T., 1901, Jan. 21.—Colt & Brown, JJ. Opinion *per curiam* "the motion to reopen the case is denied; and the motion to enter a final decree dismissing the bill is granted."

Mar. 5.—Colt & Brown, JJ. Ordered that second docket entry of May 22, 1901, be amended so as to read as follows: "May 22 Heard before Colt and Brown, JJ. on questions raised by stipulation filed March 22, 1901; it being orally agreed that said hearing shall be also a final hearing in the case."

Mar. 5.—Ordered further that the opinion *per curiam* filed Jan. 21, 1902, be amended and the docket entry of that date vacated.

Mar. 5.—Amended opinion *per curiam* filed.

Mar. 5.—Motion for final decree granted.

Mar. 5.—Final decree, bill dismissed with costs—decree in files.

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Oct. T., 1902, Dec. 8.—Claim of appeal filed.

" " —Assignment of errors filed.

" " —Colt, J. Bond approved and filed.

" 8.—Colt, J. Appeal allowed, citation issued returnable Jan. 5, 1903.

181 *Claim of Appeal.*

(Filed Dec. 8, 1902.)

The above named plaintiff, Newburyport Water Company, considering itself aggrieved by the order and decree entered March 5, 1902, in the above entitled proceedings, doth hereby appeal from said decree to the Supreme Court of the United States; and prays that this its appeal may be allowed, and that the transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

ROBERT M. MORSE,
LAURISTON L. SCAIFE,
Counsel for Plaintiff.

182 *Assignment of Errors.*

(Filed Dec. 8, 1902.)

Comes now The Newburyport Water Company, appellant, (the plaintiff in the court below,) and says that there is manifest error in the records and proceedings of the circuit court of the United States for the district of Massachusetts in this suit as follows:

I.

The court erred in this:
That it held, adjudged and decreed that the plaintiff has not been

deprived of its property without due process of law in violation of the fourteenth amendment to the Constitution of the United States.

II.

The court erred in this:

That it held that the plaintiff failed to establish a taking of its property without just compensation under the authority of the State.

III.

The court erred in this:

That, although it held that the sale of the company's property was compulsory in fact, it held that such sale was not compulsory in law.

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IV.

The court erred in this:

That it did not hold that the act of 1894 (including the act of 1893 as re-enacted by the act of 1894,) was compulsory in law as well as in fact, and constituted duress.

The said act of 1894 is chapter 474 of the Massachusetts Acts of 1894; and the said act of 1893 is chapter 471 of the Massachusetts Acts of 1893.

V.

The court erred in this:

That it held "that the threatened grant of such a franchise under the act of 1894 (admitting this to be the effect of the act) was a lawful exercise of legislative power."

VI.

The court erred in this:

That it did not find and hold that the act of 1894, (including the act of 1893 as re-enacted by said act of 1894) as construed by the highest court of Massachusetts in effect authorized a taking of plaintiff's property without just compensation; and that thereby and thereunder the State of Massachusetts deprived plaintiff of its property without just compensation in violation of the provision of the fourteenth amendment to the Constitution of the United States.

184 The said act of 1894 is chapter 474 of the Massachusetts Acts of 1894; and the said act of 1893 is chapter 471 of the Massachusetts Acts of 1893.

VII.

The court erred in this:

That it adjudged and decreed that the obligation of no contract of the plaintiff has been impaired in violation of the contract clause of the Constitution of the United States, to wit, section 10 of article I of the Constitution of the United States.

VIII.

The court erred in this:

That it excluded the testimony offered by plaintiff to the effect that the commissioners appointed by the State court to value complainant's property under the act of 1894 did not in fact value the water contract entered into between the complainant and defendant. The testimony so offered and rejected was offered under a stipulation between the plaintiff and defendant, which is set forth in the record in the circuit court at page 125 *et seq.*, and the testimony so offered and excluded is stated therein as follows:

"It is hereby agreed, if in the opinion of the court the testimony of the commissioners below referred to is competent evidence, is admissible at this stage of the case, and is material, that the commissioners appointed under Mass. St. of 1893, chap. 471, sect. 12, to value the property of the plaintiff company, if called as witnesses in this cause, would testify, without contradiction, that they did not in fact value as part of said property the contract between the company and the city, of which a copy marked 'Exhibit D' is an- to the
185 plaintiff's bill, it being their opinion that the same in law could not be valued; and it is also agreed that the same shall be dealt with in like manner as if said commissioners had so testified before the commissioner appointed by the court in this case, and as if said objections as to competency, materiality, and admissibility at this stage of the case had been duly taken before such commissioner and reserved for the consideration of the court; and it is also agreed that the petitioner at the hearing put the contract in evidence under objection."

IX.

The court erred in this:

That it did not hold, adjudge and decree that the said act of 1894 (including said act of 1893 as re-enacted by said act of 1894), as construed and applied by the highest court of the State of Massachusetts, impaired and impairs the obligation of contracts belonging to plaintiff in violation of section 10 of article I of the Constitution of the United States under the plaintiff's rights thereunder.

X.

The court erred in this:

That it ordered, adjudged and decreed that plaintiff's bill be dismissed with costs to the defendant.

XI.

The court erred in this:

That it did not adjudge and decree that plaintiff is entitled to relief.

186 Wherefore the said Newburyport Water Company, appellant, prays the honorable court to examine and correct the

errors assigned, and for a reversal of the decree of the said circuit court entered in the above entitled cause.

NEWBURYPORT WATER COMPANY,
By ROBERT M. MORSE.
LAURISTON L. SCAIFE,
Counsel.

LAURISTON L. SCAIFE,
Solicitor for Newburyport Water Company.

187 *Bond to Party on Appeal.*

(Filed and approved Dec. 8, 1902.)

Know all men by these presents, that we, The Newburyport Water Company, of Massachusetts, as principal, and George H. Norman and Frank G. Webster, as sureties, are held and firmly bound unto the City of Newburyport of Massachusetts, in the full and just sum of five hundred dollars to be paid to the said City of Newburyport, its certain attorney, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this second day of December, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a circuit court of the United States for the district of Massachusetts, in a suit in equity depending in said court between said Newburyport Water Company, plaintiff, and said City of Newburyport, defendant, a decree was entered against the said Newburyport Water Company and the said Newburyport Water Company having obtained an appeal to remove said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said City of Newburyport citing and admonishing it to be and appear in the said Supreme Court of the United States at Washington on the fifth day of January, A. D. 1903.

Now, the condition of the above obligation is such, that if the said Newburyport Water Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

NEWBURYPORT WATER COMPANY, [SEAL.]
By GEORGE H. NORMAN.
GEORGE H. NORMAN. [SEAL.]
FRANK G. WEBSTER. [SEAL.]

Sealed and delivered in presence of
CHARLES E. COWAN,
As to N. W. Co. and G. H. N.
W. ENDICOTT, JR.,
To F. G. W.

Approved:
LE BARON B. COLT,
Circuit Judge.

188 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of Newburyport, a municipal corporation duly established under the laws of the Commonwealth of Massachusetts and located in the county of Essex, in said Commonwealth, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the fifth day of January next, pursuant to an appeal duly obtained from a decree of the circuit court of the United States for the district of Massachusetts wherein The Newburyport Water Company, a corporation duly established under the laws of the Commonwealth of Massachusetts, and located therein, is appellant and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt, judge of the circuit court of the United States for the district of Massachusetts, this eighth day of December, in the year of our Lord one thousand nine hundred and two.

LE BARON B. COLT,
U. S. Circuit Judge.

189 *Acknowledgment of Service on Citation on Appeal.*

DEC. 11, 1902.

Service of the within citation is hereby accepted, with the same effect as though the same had been served by the marshal, but without prejudice to any other rights of the appellee.

A. E. PILLSBURY,
For The City of Newburyport, Appellee.

190 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
District of Massachusetts, } *ss:*

I, Alexander H. Trowbridge, clerk of the circuit court of the United States for the district of Massachusetts, within the first circuit, certify that the foregoing is a true copy of the record and all proceedings in the cause in equity entitled, No. 924, Newburyport Water Company, complainant, *v.* City of Newburyport, defendant, in said circuit court determined, the opinions of the circuit court, dated,

respectively, February 24, 1898, August 8, 1900, and March 5, 1902, the docket entries, the claim of appeal, the assignment of errors and the bond to party on appeal, and also the original citation issued upon the appeal of the complainant in said cause, with the acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this thirty-first day of December, A. D. 1902.

[Seal of the Circuit Court, Massachusetts.]

ALEX. H. TROWBRIDGE, *Clerk.*

Endorsed on cover: File No. 18,770. Massachusetts C. C. U. S. Term No. 182. The Newburyport Water Company, appellant, vs. The City of Newburyport. Filed January 2, 1903.